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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 336

LEROY A. BERRY, PETITIONER,

vs.

(THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED AUGUST 14, 1940.

CERTIORARI GRANTED OCTOBER 21, 1940.

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INDEX

	PAGE
Statement of the Case	1
Plaintiff's Petition and Affidavit of Service	3
Defendant's Answer	8
Transcript of the Testimony	9

TESTIMONY

Plaintiff's Witnesses:

Beede, Lloyd M.	
Direct	162
Cross	167
Berry, Mrs. Fatima	
Direct	185
Cross	192
Berry, Leroy A.	
Direct	11
Recalled:	
Direct	126
Cross	127
Redirect	157, 193
Recross	161, 194
Drown, Lloyd E.	
Direct	104
Cross	105
Garfield, Leslie	
Direct	169
Cross	172

Gilman, George	
Direct	182
Cross	183
Redirect	185
Hartwell, Mrs. Alga	
Direct	178
Cross	180
Hartwell, William H.	
Direct	173
Cross	175
Haviland, Randall	
Direct	48
Cross	49
Redirect	54
Recross	55
Healey, Alexander	
Direct	101
Cross	103
Kinney, Dr. Albert	
Direct	110
Cross	115
Redirect	118, 122, 126
Recross	121, 123, 126
McSweeney, Dr. R. E.	
Direct	95
Cross	97
Nadeau, Joseph E.	
Direct	106
Cross	107
Orcutt, Roy	
Direct	56
Cross	59
Redirect	64
Recross	65

Ripley, Dr. Horace G.	
Direct	86
Cross	89
Redirect	95
Sinnott, William	
Direct	108
Cross	109
Tierney, Dr. John P.	
Direct	66
Cross	74
Redirect	82
Recross	84
Wright, William L.	
Direct	44
Cross	46
Plaintiff rests	194

Defendant's Witnesses:

Ainsworth, Verne	
Direct	229
Cross	230
Barney, Albert W.	
Direct	233
Cross	234
Redirect	236
Bates, Jesse	
Direct	223
Cross	226
Bickford, Leslie E.	
Direct	207
Cross	209
Briggs, R. A.	
Direct	210
Cross	No

	PAGE
Clow, Clayton	
Direct	231
Cross	232
Connor, Miss Blanche	
Direct	213
Cross	214
Redirect	214
Drown, Warren E.	
Direct	221
Cross	222
Ellsworth, Kirk L.	
Direct	241
Cross	242
Hall, Dr. George G.	
Direct	216
Cross	218
Redirect	220
Hestwood, Deposition of J. C.	
Direct	244
Cross	245
Larrabee, Guy W.	
Direct	226
Cross	228
Redirect	228
Maynard, Dr. Robert L.	
Direct	195
Cross	202
Redirect	206
McDonald, Martin	
Direct	236
Cross	237
Morrill, Calvin F.	
Direct	239
Cross	240

PAGE

Woodbury, C. E.	
Direct	214
Cross	215
Redirect	216
Defendant rests	248

Rebuttal:

Berry, Mrs. Fatima	
Direct	249
Cross	No
Plaintiff rests	250
Motion by defendant for directed verdict	250
Arguments	251
Charge	251
Supplemental Charge	255
Verdict	258
Reporter's certificate	258

Plaintiff's Exceptions	211, 212, 254
Defendant's Exceptions	74, 74, 95, 158, 250

Plaintiff's Exhibits:

1-A Report of examination by Dr. John P. Tierney July 16, 1920	259
1-B Report of examination by Dr. A. C. Kinney, August 10, 1933	260
1-C Report of neuro-psychiatric examination by Dr. Drouin, September 27, 1930	260
1-D Report of physical examination by Drs. Hall, Wheeler and Child, March 11, 1924	262

	PAGE
1-E (4 pp.) Report of physical examination at Veterans Bureau Administration, Burlington by Drs. Maynard, Upton and Bock, December 5, 1932	264
1-F Report of physical examination by Drs. Taylor and Child, April 2, 1923	267
1-G Report of physical examination by Dr. Child, October 15, 1923	270
1-H Letter to Dr. Hall from Dr. Wheeler, March 13, 1924	272
1-I Report of neuro-psychiatric examination by Dr. Child, March 11, 1924	272
1-J Letter to Dr. Hall from Dr. Maynard, January 23, 1930 (2 pp.)	274
1-K Letter to Dr. Hall from Dr. Maynard, August 16, 1930	276
1-L (2 pp.) Letter to Dr. Hall from Dr. Maynard, April 19, 1932	277
1-M (2 pp.) Letter to Dr. Hall from Dr. Maynard, December 5, 1932	279
3 A. G. O. Record consisting of 1 certificate and 102 photostatic copies	281

Government's Exhibits:

A Letter signed by plaintiff March 29, 1919	315
A-1 Stipulation re pencil copy report by Dr. Tierney	315
A-2 Questionnaire signed by Dr. Tierney	316
A-3 Government's exhibit showing compensation payments to veteran (2 pp.)	318
A-4 Copy showing signature of plaintiff on application for motor vehicle operator's license	320
A-5 Photographic copy of registration of motor vehicles by the State of Vermont (6 pp.)	321
B Carbon copy of letter from Mr. Spinney to Mr. Berry dated January 12, 1920	329

	PAGE
C Letter to Placement Bureau January 22, 1920	329
D Federal Board of Vocational Education December 8, 1919	330
E Application of person disabled in and discharged from Service January 6, 1919	330
F Application of plaintiff for fidelity bond to National Union Indemnity Co., Pittsburgh, Pa.	333
G Application of plaintiff to Metropolitan Liberty Ins. Co.	337
H Vocational training records (28 pp.)	343
<hr/>	
Deposition of J. C. Hestwood	243
Defendant's Motion for Directed Verdict and Court's Order denying the same	250
Defendant's Motion for Directed Verdict	367
Special Findings and Verdict of the Jury	368
Judgment Order for the Plaintiff	369
Notice of Appeal	370
Defendant's Motion and Order Extending Time to File and Docket the Record, in United States District Court, District of Vermont	371
Defendant's Motion and Order Extending Time to File and Docket the Record, in the Circuit Court of Appeals ⁴ for the Second Circuit	372
Stipulation Designating the Contents of the Record	374
Statement of Points Relied upon by Appellant on its Appeal	376
Plaintiff's Assent to the Printed Record	381
Clerk's Certificate	382

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	PAGE
Proceedings in U. S. C. C. A., Second Circuit	383
Opinion, Hand, J.	383
Judgment	387
Clerk's certificate	387
Order allowing certiorari	388

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UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

UNITED STATES OF AMERICA,
Defendant-Appellant,

vs.

LEROY A. BERRY,

Plaintiff-Appellee.

Law No. 1183.

STATEMENT OF THE CASE

These proceedings were instituted by the filing of a petition in the United States District Court for the District of Vermont on April 6, 1936. Service of a copy thereof was made on the United States Attorney on April 6, 1936 and a copy of said petition was sent by registered mail to the Attorney General of the United States on April 27, 1936.

The defendant's answer was filed on May 19, 1936.

The original parties were LeRoy A. Berry, plaintiff, and the United States of America, defendant. There has been no change of parties.

A trial was held before Honorable Harland B. Howe, United States District Judge and a jury of twelve at Rutland, Vermont, beginning on November 16, 1937 and concluded on November 18, 1937. The jury reported a disagreement.

A second trial was held before Honorable Harland B. Howe, United States District Judge and a jury of twelve, at Montpelier, Vermont, commencing on May 15, 1939 and was concluded on May 17, 1939. A verdict was rendered for the plaintiff.

Statement of the Case.

The defendant filed a motion for a directed verdict at the close of all of the evidence, which motion was denied by the Court, to which denial defendant duly noted an exception.

Judgment for the plaintiff was duly signed and filed on May 17, 1939.

On August 9, 1939, Notice of Appeal was filed by the defendant, the United States of America.

On September 14, 1939 the time for filing the record on appeal and docketing the action in the United States Circuit Court of Appeals for the Second Circuit was extended to November 7, 1939 by order of Honorable Harland B. Howe, Judge of the United States District Court for the District of Vermont.

On October 23, 1939 the time for filing the record on appeal and docketing the action with the United States Circuit Court of Appeals for the Second Circuit was extended to December 15, 1939 by order of the Honorable Learned Hand, Judge of the United States Circuit Court of Appeals for the Second Circuit.

A Stipulation Designating the Contents of the Record was signed by Ernest W. Gibson, Jr., Attorney for the Plaintiff and Timothy A. Curtin, Attorney for the Defendant, on November 7, 1939 and duly filed in the Clerk's office, United States District Court for the District of Vermont, on November 8, 1939.

PETITION

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

LEROY A BERRY;

vs.

UNITED STATES.

Now COMES; Leroy A. Berry of Hardwick, Vermont in his proper person and says:

1. That he is a resident of Hardwick, Vermont; That he was a soldier of the Army of the United States during the World War; That he enlisted in Fort Ethan Allen, Vermont on or about July 1, 1917; That during the war he served as an enlisted man and was discharged from the service on or about January 2, 1919.

2. That during said service in the World War, he was duly insured by the United States Government by a War Risk Insurance Policy, duly issued by the United States Government; That said policy was in effect and paid for, to wit, up to and including the first day of November, A.D., 1919, and for thirty days thereafter; That after the discharge of the plaintiff from the United States Army and from the time the plaintiff ceased making payments on his War Risk Insurance Policy, the plaintiff has been totally and permanently disabled and will be always henceforth totally and permanently disabled because of wounds received by him in the World War service and of complications caused thereby.

Petition.

The plaintiff avers that certain evidence was submitted to the insurance division of the United States Veterans Bureau, and demand was duly made for payment of the benefits of the aforesaid War Risk Insurance policy which were then and there due the plaintiff and still are due; but though proper evidence was submitted, establishing the right to such payments, and proper demand has been made therefor, nevertheless, the United States Government has neglected and refused to recognize said insurance policy and to pay over to this plaintiff such sums of money as have come due under said policy to the plaintiff since, to wit, November 1, 1919.

4. The Plaintiff further alleges that the United States Government, in refusing to pay said plaintiff such sums of money as became his due under said insurance policy, is without right and contrary to the law.

5. The plaintiff claims that he was permanently and totally disabled on the date of his discharge from the World War service and on the date that he ceased making further payments on his War Risk Insurance policy and that his aforesaid disability was a result of his service in the World War of the United States Army; and that he has been permanently and totally disabled since he was wounded in June of 1918, and will be permanently and totally disabled forever.

6. The plaintiff further alleges that he has been forced to employ Ernest W. Gibson, Jr. of Brattleboro, Vermont, as counsel to prosecute this claim for judgment.

7. The plaintiff further alleges that the refusal and neglect of the United States Government to pay him such sums of money as are legally due him, and will be due him in the future, under the said War Risk Insurance policy, is a great damage to him, to wit, a damage of \$15,000, to recover which, with just costs, counsel fees and interest, the plaintiff brings this petition and

Petition.

the plaintiff asks judgment in this case for the amount due under the terms of said policy at the time of trial of this said cause.

WHEREFORE; the plaintiff prays the Court to adjudge that on, to wit, November 1, 1919, or within thirty days thereof, the plaintiff was the holder of a \$10,000 War Risk Term Insurance policy, which at that time was in full force and effect; That at that time the plaintiff was permanently and totally disabled; That under the terms of the said Term Insurance policy, the plaintiff is entitled to the full benefits of the policy.

The plaintiff further prays this Court, through order of the United States Government, to pay the sums due at trial under this said policy, with interest, to the plaintiff, less a reasonable amount as attorney's fees, which sum the plaintiff prays the defendant be ordered to pay Ernest W. Gibson, Jr., his counsel.

Dated at Brattleboro, County of Windham, State of Vermont, this 4th day of April, A.D., 1936.

LEROY A. BERRY,
Petitioner.

STATE OF VERMONT, }
WINDHAM COUNTY. } ss.:

At Brattleboro, in said County, this 4th day of April, A.D., 1936, personally appeared before the undersigned authority, LeRoy A. Berry, the plaintiff in the above cause, who, being duly sworn as to the truth of the allegations in the foregoing petition, says that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to any matters therein stated to be on information and belief, and as to those matters, he believes them to be true.

Before me,

ERNEST W. GIBSON, JR.
Notary Public.

Petition.

Frank E. Barber, became recognized in the above action as the law directs.

Before me,

ERNEST W. GIBSON, JR.

Notary Public.

UNITED STATES OF AMERICA, }
DISTRICT OF VERMONT. } ss.:

At Burlington, in said District, on this, the 6th day of April, A.D., 1936, I made service of the within petition by delivering to the Honorable Joseph A. McNamara, United States Attorney within and for the District of Vermont, a true and attested copy thereof with this my return hereon thereon endorsed.

Attest,

EDWARD L. BURKE,

United States Marshal,

By P. H. WALSH,

Deputy U. S. Marshal.

Travel .06

Service 2.00

\$2.06

Filed April 6, 1936.

HAROLD E. BRISTOL,

Deputy Clerk.

Returned served April 6, 1936.

AUSTIN H. KERIN,

Clerk.

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

LERROY A. BERRY,

vs.

UNITED STATES.

AFFIDAVIT OF SERVICE OF PROCESS

NOW COMES; Ernest W. Gibson, Jr., of Brattleboro, Vermont and in his proper person, on oath deposes and says, that on the 27th of April, A.D., 1936 he mailed a copy of the petition in the above entitled cause to the Attorney General, c/o Department of Justice, Washington, D. C. by registered mail. He further swears that he is the attorney for the petitioner, Leroy A. Berry of Hardwick, Vermont in the above entitled cause.

Dated at Brattleboro, Vermont, this 27th day of April, 1936.

ERNEST W. GIBSON, JR.

STATE OF VERMONT,
WINDHAM COUNTY. ss.:

At Brattleboro, County of Windham, State of Vermont, personally appeared Ernest W. Gibson, Jr. and made oath to the truth of the foregoing affidavit.

BERYL E. ATHERTON,
Notary Public.

Filed May 4, 1936.

A. MYRL BLAKELY,
Deputy Clerk.

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF VERMONT

LEROY A BERRY,

vs.

UNITED STATES OF AMERICA.

No. 1183 Law.

DEFENDANT'S ANSWER

Now comes the defendant in the above entitled action and for answer denies each and every material item, allegation, count and particular in plaintiff's petition contained.

JOSEPH A. McNAMARA,
United States Attorney.

By WILLIAM J. HESSON,
Atty. Dept. of Justice.

Filed May 19, 1936.

A. MYRL BLAKELY,
Deputy Clerk.

TRANSCRIPT OF TESTIMONY

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

LERROY A. BERRY,

vs.

UNITED STATES OF AMERICA.

No. 1183.

Special April Term, 1939 at Montpelier, May 15-17, before
Howe, J. and Jury.

Appearances:

Ernest W. Gibson, Jr., Esq.,

F. Elliot Barber, Esq.,

Attorneys for Plaintiff.

Joseph A. McNamara, Esq.,

United States District Attorney,

Timothy A. Curtin, Esq.,

Attorney, Department of Justice,

Attorneys for Government.

KATHARINE A. GARDNER,

Official Reporter,

Federal Bldg.,

Burlington, Vermont.

Transcript of Testimony.

J U R Y

1. H. C. Wormwood, Foreman, Barnet.
2. Clyde Bailey, Berlin.
3. Robert Abbey, Middlesex.
4. Horace Gleason, Barnet.
5. Richard B. Osha, Randolph.
6. Frank P. Learned, Newbury.
7. Geo. W. Buswell, Montpelier.
8. Carroll E. Ricker, Groton.
9. L. N. Brainard, Corinth.
10. Frank Ford, Sutton.
11. Earl Roberts, Northfield.
12. Jesse Smith, Lyndon.

Jury empaneled at 9:45 A.M. and H. C. Wormwood appointed Foreman.

Mr. Gibson: If the Court please, I would like to ask counsel for the defense to give us the Service Record of the veteran. (A. G. O. record produced by Mr. Curtin and handed to Mr. Gibson.)

Brief opening statement of plaintiff's claims made by Mr. Gibson.

The Court: Now, Mr. Curtin, do you want to say what the defense is?

Mr. Curtin: I do, Your Honor. This suit involves one question and that is whether Mr. Berry became totally and permanently disabled before his insurance lapsed sometime in 1919. * * * *

Mr. Berry—direct.

LEROY A. BERRY, the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Gibson:

Mr. Gibson: At this time I would like to offer this record. (A. G. O. record, marked Pltfs. Ex. No. 3.) (1 certificate and 102 photostats.)

The Court: Admitted.

Q. State your name please? A. Leroy A. Berry.

Q. You live where now? A. In Battleboro.

Q. How long have you been living there? A. About a year and a half.

Q. Before that you were living where? A. In Hardwick.

Q. Where were you born? A. In St. Johnsbury, Vermont.

Q. And when? A. April 4, 1895.

Q. And immediately before this country went into the World War what were you doing? A. Working on a farm.

Q. What was the condition of your health at that time? A. I called it very good.

Q. Well, describe it to the jury. A. Well, I could work all day and play all night and go back to work the next day.

Q. Sleep well and eat well? A. Slept well, yes, and ate well.

Q. Now sometime after April of 1917 what did you do? A. Well, after the war broke out I went and enlisted as soon as I could.

Q. And where did you enlist? A. Enlisted at St. Johnsbury.

Q. After you enlisted where were you sent? A. They sent me to Fort Ethan Allen where I had a Federal examination

Mr. Berry—direct.

and was accepted and put into the First Vermont Infantry, Company L.

Q. Where was the First Vermont Infantry then sent from Fort Ethan Allen? A. In about two months they were sent to Westfield, Mass.—a part of us.

Q. What was done with you? A. I went to Westfield, Mass.

Q. What happened to you there? A. I was put into the 103rd Infantry, 26th Division.

Q. That is, the Vermont unit was broken up as a State unit at that time? A. Yes.

Q. And you were put in the 103rd Infantry? A. Yes.

Q. How long were you at Westfield? A. About a month.

Q. Did you purchase some war risk insurance while in the Service? A. After I got overseas, yes.

Q. How much did you purchase? A. \$5,000. at one time and then a few months later another five thousand.

Q. How did you pay for that? A. That was taken out of my pay every month.

Q. How much did you get a month for pay? A. \$30.00.

Q. The pay for the insurance was taken out of that \$30.00?

A. Yes.

The Court: The Government didn't issue policies very often—they just put the man's name on the list and the Act of Congress was the policy.

Witness: I had a card with a number on it, if I remember right.

Q. In September of 1917 did the 103d Infantry and you with it, sail for France? A. Yes, sometime in September—the latter part of September.

Q. Where did you sail from? A. New York.

Mr. Berry—direct.

The Court: Why do we care about this getting over there?

Q. You go ahead and tell the story of your service now.

A. We went overseas and landed in England and were there about ten days in a rest camp or training camp, and then went across the Channel to LeHavre to another training camp in Bilexell, (?) France, another training camp,—and about the first of February we went up into the lines in the Chemin des Dames Sector as it was called, near Soissons.

Q. When you say you went up into the lines, what did that consist of? A. That was first and second and third line trenches where there was supposed to be some action part of the time.

Q. How long were you there? A. We were there very near two months up in that sector. During that time I had mumps and went back to the hospital. When I got out of the hospital the outfit had gone back to the rest camp.

Q. You joined it there? A. So I joined the outfit at the rest camp and within a very few days we were sent up into the Toul sector.

Q. Do you remember about when you went up into the Toul sector? A. Sometime in April—I cannot tell exactly but between the first and the middle of April.

Q. Was that sector subject to hard shelling? A. At times.

Q. You tell what happened during one of those bombardments? A. Every few days or every—sometimes every day—they would try a raid on some sector or another; start shelling with the artillery into the lines and try to break things up what they could and then when they got things broken up they would try to rush us and drive us out.

Q. Mr. Berry, on June 16, 1918 what was your duty?

A. Duty at night was every night we all had to stand guard.

Mr. Berry—direct.

Q. In the front trenches? A. Watch for raids; either that or out on patrol work between the lines—out inspecting the barbed wire, and seeing that there was no raiding parties coming over.

Q. On the morning of June 16th, early morning, tell us what happened? A. I was standing guard and the enemies started shelling the front line, and the first shell that I—as I remember it, the first shell that came over anywhere near where I was—within half a mile or so—landed very close to our squad and that was where I got my first wounds.

Q. Did that shell strike you, or parts of it? A. Parts of it struck me, yes.

Q. Where? A. One piece in my right arm, just above the elbow, and another piece in the right shoulder, and one piece in my right hip, and a couple small pieces in front of my right ear.

Q. In front of your right ear? A. Yes.

Q. Is there still a piece of that shell in your elbow? A. There's still a piece in my elbow and still a piece here in front of my ear now; a small piece. The other two pieces have worked out.

Q. After you were hit what did you do? A. Well, the first thing I knew after I was hit, there was a fellow helped me down the trench toward a dugout; another fellow was helping me down the trench and we met Platoon Lieutenant and he told this other fellow to take me ———

Mr. Curtin: I object to the conversation.

The Court: That's all right, what the officer told him.

Mr. Curtin: That's all right as far as he went but I thought I would speak now rather than later.

Q. Let me ask you this—as a result of this talk with the Lieutenant, did you go down to a dugout? A. I was ordered

Mr. Berry—direct.

to go down into this dugout. The other man was ordered to take me down there until the barrage lifted, or they stopped shelling the front lines, so I could get back to the First Aid Station.

Q. Did you go into that dugout? A. Yes.

Q. What did you find there? A. I found several other fellows in a similar condition. They had all been hit and were waiting for an opportunity to get back to the First Aid Station.

Q. How many? A. There was—well, eight or nine or ten, somewhere—I don't remember exactly how many, and a couple fellows in there—one was our Platoon Sergeant—that was trying to undo a First Aid pack to put on another fellow's leg, and there was another fellow that was wounded—not very severely—that tried to undo one to put on my hip.

Q. What time did this barrage start that morning? A. About three-thirty in the morning.

Q. What time do you think it was when you went into this dugout? A. It was very soon after; probably within fifteen minutes.

Q. All right, go ahead. A. We had been—I had been in the dugout about fifteen minutes to half an hour, when another shell came over and struck directly in front of the dugout door. The dugout by the way was only a small thing; it wasn't any depth or any size to it—just a sort of shelter in the side of the trench. This shell struck probably fifteen feet in front of our door—this opening—and it upset the whole nine of us, or ten of us, whatever it was that was in there, and I know the Sergeant that was right beside my feet, trying to undo the First Aid pack—it killed him outright and he landed over on top of me—pitched over right on top of me. When I got him off my body I found my leg here (indicating) was hit; I found the bottom of the foot was turned up so I could see the bottom of the shoe; it was practically cut off.

Mr. Berry—direct.

By the Court:

Q. That is your left leg? A. Yes, the left leg; below the knee, and the blood was streaming out. There was no one—didn't seem to be—there to help me to cord it up or anything of that sort and I managed to take what was left of my wrapped legging that we all wore and tied it around there and twisted it up enough so it shut the blood down some. Within a few minutes there was another fellow came along and looked in there—I expect to see who was there or what was going on, and I asked him if he would tighten it up and cord it up so it would stop bleeding, and he did. He put a stick through the tourniquet I had on there and twisted it up and fastened it so it would stay.

Q. What happened to the other men in that dugout with you? A. They was two others that died within a very few minutes that were right there very near to me, and there was two beside myself that I know of got out of it alive that are still living, and there was two others I heard afterwards died before they got into the hospital.

Mr. Curtin: Is this important to the issue here as to Mr. Berry's condition?

Mr. Gibson: We say it is important showing the nerve ordeal of this man.

The Court: Do you claim that that affected his nervous system?

Mr. Gibson: Yes Your Honor.

The Court: That would make it admissible, if he had nervous shock.

Q. All right; was there anybody else in there able to move other than yourself, after this thing hit? A. There was no one able to move to get out of there or anything of that sort, no.

Mr. Berry—direct.

Q. How long did you stay there in that condition? A. It was approximately 10:30 in the forenoon before I was put on a stretcher and carried out.

Q. Then tell where you were taken? A. I was taken back to the First Aid Station where they put on what was called a Thomas Splint to hold that foot out straight and stretched it out so the bones wouldn't grate together, and a different tourniquet put on and something for a dressing was put on and they gave me I think at that place two shots in the arm—one any way—and I had two or three others before I got back to the hospital. One I believe was for lockjaw and the other was something to deaden pain so they explained to me at the time.

Q. What time did you get back to the hospital? A. It was about five or five-thirty in the evening—in the afternoon, when I got back to the hospital where I was staying where there was doctors. I was carried into the Receiving Ward along with the others and laid on the floor along in a line there—several stretchers—and the Operating Surgeon came out with his gown and as he came out of the operating room looked along at the different fellows there in the receiving ward; he started to pass me and looking along at the different ones, turned around and came back to look at me and spoke to me and asked me where I was hit. I told him my leg and he lifted up the blanket and looked at it, felt of my pulse, and turned around to the attendant and told him to get my clothes off and get me into the operating room as quick as they could, and I was taken right away into the operating room and put on the table and given ether—and that's the last I knew until sometime the next day—in the afternoon I think it was—when I woke up—came out of the ether.

Q. I want you to point to the jury also the shrapnel that went through your right leg. A. Well, it went in here (indicating) on a slant on the inside, and I was sitting down at the time that struck, with my feet crossed ———

Mr. Berry—direct.

The Court: He points to the inside of his right leg, above the knee.

—— and it tore through on an angle there so it left a scar seven and three-fourths inches long at that time.

The Court: Are you going to have the jury see that?

A. (continued) And it went through here (indicating) missing the bone, so that it very near came out at the surface just below the point of the hip and was taken out about a month later. That was not taken out at the first outfit but was located with the X-ray and taken out about a month later.

Q. You had that wound, did you, at the time that shell exploded that knocked your left leg off? A. I had that from the first shell—the right leg—and that right leg bothers me about as much as the left when it's bad, from the muscles being torn.

Q. After you were operated on, when you woke up what did you find—did you have any left leg? A. I found my leg was gone. I couldn't see it but I thought by the feeling of it it must be, and the looks of it before I went to the hospital it must be, so I asked and they didn't want to tell me but they finally did. They told me "yes, it was gone."

By the Court:

Q. Where did they take it off, below or above the knee?

A. Five and one-fourth inches below the knee; something like that; below the kneejoint.

Q. Did you also learn you were given two blood transfusions there? A. Yes, I had a bandage or dressing on my left arm here (indicating) in the elbow-joint, and I asked them what that was—I didn't know I was wounded there. They explained

Mr. Berry—direct.

to me that was where they pumped blood into me and told me they put in all the blood that two could stand to have taken away from them without endangering them; that they had had to pump into my system beside giving serum to make blood that they injected into my arm.

Q. Do you have those scars on your body? A. I have that scar.

Q. Go ahead and tell your life in France from the time you woke up in bed there. A. I stayed in that hospital for about a month and a half, or a little over a month and a half; during that time the stump where the leg was taken off was operated on twice. I was taken over and that had to be scraped and cleaned up, and then I was taken over again and it was closed up and sewed together, and I also had to go to the operating room and have this piece of shrapnel taken out of the right hip, and the doctors refused to take the piece out of the right arm because they said it was so close to the junction of nerves it would probably cause me more trouble if taken out than it would to leave it in.

Q. How long did you stay in that hospital? A. I was there until about August 1st from the 16th of June.

Q. Then where were you moved to? A. To Base Hospital No. 9. I was only there a very few days and went to Orthopedic—Base Hospital No. 9 in Chateauroux and there they fitted me up with a sort of a crude peg leg made up of plaster, gauze, etc. and exercised that stump leg to reduce the size of the stump down and try to get it into condition so that I would be able to wear an artificial leg.

Q. From there where did you go? A. Went from there down to Base Hospital No. 8 and only stayed there about two nights and was sent to the boat and home; left France on the boat the last day of August and I arrived in Boston the 7th day of September.

Mr. Berry—direct.

Q. Where were you sent to when you landed here? A. To the Hospital Department at Fort Banks, Winthrop, Mass.

Q. How long were you kept there? A. I was kept there about three weeks and then transferred to—I cannot think of the number of the hospital now, but at Rahway, New Jersey, Government Hospital.

Q. Were you discharged from there? A. No, I was kept there until just before Christmas and treated for the leg and had a temporary leg made while I was there that I could walk on some, and then just before Christmas I was sent up to Camp Devens with the unit to be discharged from Camp Devens.

Q. So did you have a wooden leg when you were discharged? A. I had a temporary leg, yes.

Q. What happened when you tried to stand on that wooden leg, if anything? A. That didn't fit good enough and wasn't made right so that I could really stand on it very long. I had to use crutches a lot of the time with it and use a cane, and part of the time two canes, to get along with that temporary leg at all, although there were days that for an hour or two I could get along and walk around the house or something like that without any canes.

Q. Then did they furnish you with another leg? A. In May of 1919 I got another leg—one that was supposed to be a permanent leg.

Q. Was that the one you have? A. No, I have had seven I think.

Q. What has happened with all those legs when you have stood on your stump on those legs for any length of time? A. Well, it has caused blisters, abscesses—got sore so that I have had to leave the leg off and wear it for a few hours, or wear it for a few days. Sometimes I have even been able to work in cool weather for perhaps two or three weeks, and then there would be

Mr. Berry—direct.

a few days that I couldn't work. In hot weather the periods I couldn't work would come oftener.

Q. Now I want you to describe to the jury what those abscesses look like and feel like, because at recess I want them to look at you. A. The first abscess I had came on to me in the summer of 1919, which was called a nerve abscess by the doctors. It was something—after it was taken out I saw it myself—they pickled it in alcohol so I saw it—very much like an onion bulb—small onion set—that grewed on the end of the nerve, and then another sort of a pus sac on the end of the small bone of the leg.

Q. When these abscesses develop can you wear that leg? A. No sir.

Q. What do you have to do? What do you do? A. I have to leave the leg off and poultice it and get those abscesses drawn to a head and have them lanced and wait for them to heal up and bandage the leg and get the swelling out of it and get the leg back down before I can get the leg on.

Q. When you do that do you have to stay in bed or what? A. Part of the time in bed and part on crutches and part in the chair.

(Recess at 11 A.M.)

Mr. Gibson: I would like to have Mr. Berry, and the Court, the lawyers and the jury come into the jury-room.

The Court: Let the jurymen have their recess and then do it right here.

(After recess the plaintiff's leg is examined in the presence of the Court, Jury and attorneys, without the reporter present.)

Q. Now Mr. Berry will you point on your body to the places on your right leg where you have scars made by the shrapnel? A. On the inside of the right thigh.

Mr. Berry—direct.

Mr. Gibson: He's now pointing on the inside of the right leg, near the crotch.

The Court: No, he's pointing about four inches above the knee.

Q. And extending up about ——— A. Between those two places there (indicating); it's one scar.

By the Court:

Q. How long is the scar? A. Seven inches and three-fourths was the original length.

By Mr. Gibson:

Q. Now where else on that leg ——— A. And the piece came out on the inside just under the hip bone.

Mr. Gibson: And pointing just in the right rear of his right hip bone.

Q. And where else is there another scar? A. Another scar about three inches below that, that I don't know what it was —whether it was a piece of shrapnel or whether operative, or what, but I know it all came out of the same thing, and all those holes were connected through there and had rubber tubes through them when I came to and knew about it.

Q. Will you also point to the scar on your right arm?
A. Just above the elbow on the outside (indicating).

Mr. Gibson: Pointing to a place just above the right elbow on the outside of his arm, toward the back.

Q. Will you point to the place on your right shoulder where ——— A. Just in back of the shoulder.

Mr. Berry—direct.

Mr. Gibson: Pointing to the place directly in back of the right shoulder.

A. (continued) Just barely below the shoulder joint; just about on the shoulder joint.

Q. Will you point please to the place on the right chest?

A. Just under the collarbone on the right side.

Q. Did you have another place on your chest? A. No, I think that's the only one on the chest.

Q. Will you point on your head to where you had a shrapnel wound? A. Just in front of the right ear.

Q. And now except for your left arm and leg have you told us all of the places you were hit? A. Nothing only what the Doctor told me in the hospital, that I had three other wounds on that stump.

The Court: You have to leave that out.

Q. Well, an Army Doctor? A. The one that operated on me.

Mr. Curtin: You have the army records to show all that.

Q. On your left arm did you have some scars? A. An operative scar there where I was given blood transfusions at the time the leg was taken off.

Q. And have you shown your leg to the jury? A. Yes.

Q. That is your left leg? A. Yes.

Q. You took off your artificial leg? A. Yes.

Q. And on the bottom of your stump is there an operative scar that runs directly across the bottom of your stump? A. Yes.

Q. On either side of that, is that where you pointed out you receive many blisters? A. Yes.

Mr. Berry—direct.

Q. Were there other scars on the side of your stump showing where other abscesses or blisters have been removed?

Mr. Curtin: I realize that possibly the question contains the evidence the witness is going to give, but I would prefer to have the answer contain it rather than the question.

Mr. Gibson: All right, I will change my question.

Q. Tell the jury what other scars you pointed out on your stump? A. The scar where a nerve abscess and pus sac were taken out on the outside of the end of the stump, and three scars where abscesses had been lanced—pus abscesses on the inside of the stump.

Mr. Gibson: I think that covers the description.

Q. When you were discharged from the army, by the way, what time of year was it? A. January 2, 1919.

Q. Where did you come to? A. Came to Sheffield to my brother's.

Q. And living at your brother's did you meet a girl—Fatima Gilman, was it? A. Yes, she lived there.

Q. And had you known her before going overseas? A. Yes, I had known her for several years as a girl.

Q. Had you more or less been brought up in their family? A. I had worked there and stayed there and chummed around with her brother and she had also lived with her older sister—who was my sister-in-law—for a matter of five or six years previously.

Q. Upon your return did you and Miss Gilman get married? A. We were married in about three months and a half or four months.

Mr. Berry—direct.

Q. Now did you have what you call a temporary leg at that time? A. Yes.

Q. How much could you use that leg? A. Well, I could use it sometimes quite a lot and sometimes I couldn't use it very much. Some days I could get around pretty good.

Q. Could you use it for two or three days at a time? A. I don't think there was ever a time I could stay on it two days at a time, at one time.

Q. After you were married were you sent to New York for some training? A. Yes, about three weeks after I was married.

Q. That is, you were given vocational training by the Government? A. Yes.

Q. In what? A. In photography.

Q. Your newly acquired wife went with you? A. Yes.

Q. Where did you live in New York? A. We lived on 48th Street and on 104th Street.

Q. How did you get back and forth to this school? A. I had to go about half a block to the Elevated and then take the Elevated from there to within about a block of the School.

Q. What did you discover about your leg? A. The leg bothered me all summer about getting blistered—getting sore—and it was during that time that the nerve abscess started, and I started having trouble on the outer side of the end of the leg.

Q. How did you get to the trolley car from your house? A. I had to walk.

Q. Most of the time what did you use? A. Sometimes I used crutches—when my leg was sore so I had to, I had to walk on crutches, and a lot of the time I carried a cane.

Q. On occasions was it easy to get on the street car with crutches? A. Not very easy, no.

Q. As a result did you sometimes fall getting on the street car?

Mr. Berry—direct.

Mr. Curtin: This is his witness. It is very leading and I object to it.

Q. Tell us some of the experiences getting in or out of street cars?

Mr. Curtin: The damage is already done now; you told him what to say.

A. I was coming back from the school one day, at the finish of the day—rode up on the surface car that time, not the Elevated—on the surface car, and when I went to step off the car I got up and walked to the door apparently the same as I had right along; when I went to step off the car I stepped down left foot first and as soon as my weight went on it, it hurt so the thing just buckled on me and I went in a heap there in the street, and the Motorman got out and helped me up on to my feet and hung on to one arm, and I hopped on one foot across to the curb and got into a store there and got a piece of board—part of a packing case—and used that as a crutch to get down half a block to where I lived, and that afternoon my wife had to go out and buy me a pair of crutches.

Q. Did there come a time down there when you would have thunder storms——

The Court: You are going to get in trouble here.

Mr. Gibson: I want to ask what effect a thunder storm has on it?

The Court: That's good, if any?

Q. Tell the jury what effect, if any, a thunder storm has on you and did have on you back in 1920? A. Well, one thing it made me sick if a thunder shower came in the day time—when I was awake I would just be sick to my stomach and shaking

Mr. Berry—direct.

all over and sweat, and I have been sick to my stomach so that I couldn't keep anything down, and I have had showers—showers coming at night, when I was asleep, instead of waking me up I would see the whole thing all over again just as it was over across—see the shells flying and breaking (witness cries).

Q. What effect did it have on you in 1920 and still, hearing martial music? A. It brought it back—all the things I had been through.

Q. Do you go to Legion meetings where they have a drum corps? A. I don't intend to if I can miss it.

Q. What about 4th of July since 1920 on, what do you do then? A. I have been to two 4th of July Celebrations where they had fireworks in twenty years.

Q. What happened on those occasions? A. Just about the same as the thundershower—it just made me sick; made me shake all over.

Q. Is that anything you can help? A. No, it isn't.

Q. What about when you go to the movies and see soldiers and airplanes and shooting?

Mr. Curtin: Well, listen—I suppose he's going to ———

The Court: You needn't write this down, Mrs. Gardner—* * * * *

Q. repeated. A. It makes me sick and nervous and I have had to get up and leave the picture show.

Mr. Gibson: All right.

The Court: Let him talk.

A. (continued) I have had to get up and leave because it didn't seem as though I could stand to see it through.

Mr. Berry—direct.

Q. Go on. A. Well, that's ———

Q. You say this nerve abscess came on you in the summer of 1920 or 1919? A. In 1919.

Q. What was done about it? A. I was treated to the Veterans Bureau in New York, and Dr. Bookstaver of 104th St., New York—we were living in his apartment—taking care of his apartment.

Q. Did your wife go to work while you were in New York? A. She worked for our board and room there at Dr. Bookstaver's, yes.

Q. He treated your leg in 1919? A. Yes.

Q. Who else treated it in 1919? A. The Veterans Bureau Doctors there in New York.

Q. In the summer of 1919? A. Yes.

Q. They didn't operate on it at that time? A. No, they gave me something to put on to it and told me to stay off from it and leave the leg off for a few days until it got better, and if it didn't get better they would have to operate.

Q. Did it get better? A. It got better so it didn't bother me so much. I got so I could wear the leg part of the time.

Q. How long were you in New York? A. Very near four months.

Q. Then where did you go? A. I went to Effingham, Illinois.

Q. Did your wife go there with you? A. No.

Q. Tell the jury what happened there. Tell the school you went to. A. I went to Illinois College of Photography to take a post graduate course and the leg bothered me out there just the same as it had previously.

Q. How much did you have to use crutches out there?

A. Quite a lot. I cannot tell you just how much but a quite a lot.

Q. When did you get through that school? A. I came

Mr. Berry—direct.

back home in November—I finished sometime in November and came back.

Q. Where did you come to? A. Came back to my wife's father's.

Q. Was there any work for a photographer around Vermont ———

Mr. Curtin: I object to that Your Honor.

Q. Let me ask you, did you find any work for a photographer around Vermont at that time? A. I did not.

Mr. Curtin: Did he go to work is what we are interested in, not whether he looked for it or found it.

The Court: Suppose you put it this way: what opportunities, if any, were there for the services of a photographer?

Mr. Curtin: I don't think it is a competent question whether or not there were opportunities for a photographer in Vermont. They have photographers, just as they have garages and storekeepers, etc. * * * * * You can get the work if you are able to do it and have a trade.

The Court: I think that is admissible, notwithstanding what you say about common knowledge.

Mr. Curtin: In the final analysis the jurors have that knowledge as well as you or I, or the witness.

Q. What opportunities were there around St. Johnsbury and vicinity for this kind of work? A. None that I found.

Q. By the way, tell the jury what kind of work you were trained to do in this work. A. General photography—developing pictures, developing plates and printing pictures—the prints

Mr. Berry—direct.

from the finished negative, and operating the camera, and, of course, part of the training was retouching and finishing, too, and spotting.

Q. From your experience what did you find when you tried retouching—could you do that retouching? A. I couldn't for but a very few minutes at a time.

Q. Why? A. I would get so nervous I couldn't. My hands would shake so that I couldn't.

Q. Then what did you do? A. I stayed to my wife's father's that winter.

Q. Did you work any? A. I didn't work only to help putter around the house and be out some to the barn and try to help him do a few chores in the barn.

Q. What about your leg during that time? A. During the winter, as I remember, it didn't bother me very much.

Q. In the spring what did you try to do? A. I went to—moved to St. Johnsbury and tried to work in the Fairbanks Scale Shops in the paint department. I worked in there about a week; I think it was eight days if I remember right.

Q. What happened? A. They let me go because I lost so much time that I couldn't keep it up.

Q. Why did you lose time? A. Because my leg was sore and I couldn't get back and forth to work, and couldn't work after I got there.

Q. What did you do then? A. In about two weeks time I went to work in the Cary Box Shop because that was nearer to where I lived. I moved very near—the next house to the box shop—and tried to work in there, and I lost a lot of time there with the leg and it was while I was working there that Dr. Tierney treated my leg for this nerve abscess and for blisters on the leg, and sent me to—recommended that I go to Parker Hill Hospital in Boston and have the thing operated on.

Q. This was in 19 ———

Mr. Berry—direct.

The Court: Ask him who Dr. Tierney is—whether a Soldierman Doctor?

Q. Who was Dr. Tierney? A. He was a Veterans Bureau Doctor, yes.

Mr. Curtin: The Government has various types of doctors. Dr. Tierney was never a full time doctor.

The Court: Very few of them are.

Mr. Curtin: They have doctors full time.

The Court: Few.

Mr. Curtin: No, there's quite a few.

The Court: Yes, but a great many are part time.

Mr. Curtin: Oh yes.

Q. After Dr. Tierney treated that and advised you to go to the Parker Hill Hospital, did you go there? A. Yes.

Q. This was in what year? A. The spring of 1920.

Q. How long were you at that hospital? A. Twelve or fourteen days—about that; about two weeks.

Q. What was done to you there? A. Two growths was taken out; operated on and two growths taken out.

Q. Were those the growths you described to the jury earlier this morning? A. Yes, the nerve abscess and the pus sac.

Q. When did you return home from there? A. About the middle of May.

Q. Did you work any that summer? A. I did not.

Q. And why not? A. I wasn't able to; the leg didn't get healed up until in July enough so I could wear the leg at all—the artificial leg at all, and after it did get healed up it was still so tender that even walking around the house I would have to take it off before the day was over.

Q. When did you next try to work? A. I tried to work

Mr. Berry—direct.

in the garage a little that fall—a few days. I did work for a few days in a garage.

Q. Then did you go into vocational training? A. I started vocational training I think in January of 1921 in Lyndon.

Q. That was training provided you by the Government?

A. Yes.

Q. What garage did you start that in? A. The Lyndon Auto Sales Company.

Q. How long were you in training there? A. Until May.

Q. Until May of 1921? A. Yes.

Q. Then where? A. Then to the Morrill Garage in Danville.

Q. Did these garages pay you? A. They did during the summer when there was work to do.

Q. And the rest of the year? A. And during the winter—slack time—they didn't.

Q. Now how long were you at this Danville garage? A. About three months.

Q. And then where did you go to? A. To the Corner Garage in St. Johnsbury.

Q. And who worked with you there? A. There was about twenty.

Q. All right ——— A. Alec Healey was the foreman.

Q. He was the man you worked under? A. Yes, he was the man I worked under. There was Louis Bellville was one of the mechanics, Volney Ash and others—I don't recall the names of the others—there was nineteen or twenty worked there but I cannot think of their names.

Q. How long were you there? A. I was there all of that year and around until the next November—November of 1922.

Q. Then where did you go? A. To Woodbury & Benoit's Garage in St. Johnsbury.

Q. You finished training there? A. Yes.

Mr. Berry—direct.

Q. When did you finish training? A. April 15 I think.

Q. 1923? A. Yes.

Q. While in this vocational training did you get a lot of letters from the Veterans Bureau or from the Vocational Offices complaining about the way you were training?

Mr. Curtin: If Your Honor please ———

Mr. Gibson: That is admissible, isn't it?

Mr. Curtin: It is if the witness stated it but it is not admissible for the attorney to testify.

Q. Did you get some letters ———

Mr. Curtin: The damage is done. I wish to object. He's practically told the witness the answer in his question and now he asks the witness and the witness will state just what he said in his question. I don't like to keep objecting but this is a pretty important matter and concerns the very element in issue here, and I strongly object to continuous leading questions on the part of Mr. Gibson.

The Court: Well, what are we going to do about it?

Mr. Curtin: I think the Court should admonish him and instruct him to stop it.

The Court: I have.

Mr. Gibson: I didn't think that was leading. I wish to ask him in detail about those letters.

Q. Let me ask you during this time did you receive letters from the Vocational Offices of the Veterans Bureau?

The Court: Try it this way: What complaints, if any, did the Government officials make as to your training? How's that?

Mr. Berry—direct.

Mr. Gibson: Very good.

Mr. Curtin: I don't think any of those questions are right, Your Honor. Here, out of a million subject matters, why pick out complaints? Your question starts off apparently on the theory complaints were made.

The Court: I think it's all right to direct his attention as to whether it was complaints or praise.

Mr. Curtin: What difference does it make if they did complain? The question is whether or not he could do the work.

Mr. Gibson: If you will produce those letters? I will ask you to produce them.

Mr. Curtin: Your client got the letters. He didn't send them to us.

Mr. Gibson: He didn't keep the letters but you must have copies of them.

Mr. Curtin: We haven't any copies and if the letters were ever written, you have them.

Q. You answer Judge Howe's question.

Q. repeated by reporter. ("What complaints, if any, did the Government officials make as to your training?") A. The training inspector that came around, was supposed to come once a month, complained and asked me reasons why I wasn't getting in more time, and I also received two letters any way from the Veterans Bureau office asking me why I was losing so much time; they was getting reports I was losing so much time.

Q. When you ceased vocational training in 1923 in April, then did your living, expense money from the Government, also cease—when you stopped vocational training? During training did you receive some money from the Government? A. I received compensation, yes.

Mr. Berry—direct.

Q. When your training was completed did that cease? A.

It was cut down to 44 per cent or \$44.00 a month.

Q. And by the way, have you any children? A. Yes.

Q. How many? A. Seven.

Q. I guess we better get the dates of birth from your wife may be

By the Court:

Q. Tell us how old the oldest is and how old the youngest?

A. The oldest is eighteen and the youngest one is about two and a half.

By Mr. Gibson:

Q. Who did you work for after you got through your vocational training? A. For Woodbury & Benoit, where I finished my training.

Q. How long did you work for them after you finished training? A. About six months.

Q. Why did you stop? A. Mr. Woodbury told me he didn't need me any more because he had got to have a man there steady.

Q. During that time were you able to work steady? A. No.

Mr. Curtin: I object to that; the question is whether he did.

Q. Did you work steady? A. No.

Q. And about how much time did you miss? A. An average of two days a week, as near as I can remember it.

Q. Why did you miss that time? A. Partly owing to stomach trouble and partly owing to trouble with my leg.

Q. Tell us about the stomach trouble? A. Gas in my stomach and I would fill up so I couldn't breathe.

Mr. Berry—direct.

Q. By the way on occasion does your right hip bother you?

A. Yes.

Q. Tell us about that? A. That bothers me about sleeping nights, with cramps, and bothered me about being lame—sort of a rheumatic trouble in there so I have been on crutches for five weeks straight with that alone.

Q. When was that you were on crutches for five weeks because of your right leg? A. The time I was on crutches for five weeks was I think in 1932.

Q. After you left or were fired at Woodbury & Benoit's in _____

Mr. Curtin: Is there any evidence he was fired?

The Court: Yes, he said that was the reason he got through there.

Q. Where did you next go to work and how soon? A. I worked—started in within four or five days at the Fairbanks Scale Shops doing repair work on electric motors and machines and worked there about two weeks.

Q. Why did you stop working there? A. They let me go because I was losing so much time and my leg was bothering me so—the work was too hard.

Mr. Curtin: I object to this. I think the best evidence is the fellow he worked for.

The Court: No, they both would be capable of testifying—the foreman that he discharged him, and the man that was discharged would be capable of testifying he was discharged. I think that is all right.

Q. Then where did you go? A. I did a little repair work at my home on different cars.

Mr. Berry—direct.

Q. Where was your home? A. In St. Johnsbury.

Q. How long did you do that? A. Well, off and on, what I could get, all winter; from November until about the first of March.

Q. That is, you just had a shop at home? A. Just a little shop, a little garage that I could get one car in.

Q. How much of the time did you work? A. Well, I think I could stand it to do all the work I got that winter, because winter is a slow time, but I did work and overhaul what cars I could get to do that winter; it wasn't very much because we lived very scant I know that winter.

Q. In January 1924, or in the spring of 1924, what did you do? A. I went to Sheffield and bought a small farm.

Q. Move your whole family there? A. Yes.

Q. How big a farm? A. Well, there was a little under a hundred acres—around ninety acres or something like that.

Q. How long did you stay there? A. Four years and a half about.

Q. Now did you do the farming there? A. Very little of it.

Q. Could you milk a cow? A. Some of the time I could milk a cow or two.

Q. Go on. A. And most of the time I had a hired man and my wife did the milking quite a lot of the time. My wife's got two sisters lived with us about half the time we were on the farm and they both helped about the milking. I had a hired man more than half the time I was on the farm.

Q. Did you garden there? A. Yes, we planted a garden every year.

Q. Did you tend it? A. Not very much.

Q. Why not? A. Because I couldn't; couldn't get around the garden on crutches, and if I couldn't walk on the leg I couldn't do it.

Mr. Berry—direct.

Q. Were you able to go after the cows at night?

By Mr. Curtin:

Q. Did you go after them?

Mr. Gibson: All right.

A. I did once in a while; sometimes I used to go horseback because I couldn't walk over the rough ground, and a lot of the time my wife or one of her sisters would go and drive the cows in.

Q. After you lived on that farm about four years what was your financial outcome? A. We lost the farm; lost everything we had in four years time.

Q. Was the farm taken away from you? A. The farm was taken away from us.

Q. The cattle taken away from you? A. Yes; no, the cows weren't taken away from me. I had a chance to sell them and I sold them for enough to pay up the mortgage.

Q. While you were on the farm did you try to do a little automobile work, too? A. Yes, I did a little automobile work there at home the first summer—that was in 1924. In 1925 I went in partnership with Roy Orcutt in Sheffield in a little garage down there and we worked together that summer and the next winter.

Q. What happened after that? A. Orcutt wouldn't stay in partnership with me because he figured he had to do the most of the work and sold out my interest to another fellow.

Q. Were you able to work steadily at that time? A. No.

Q. And have you ever been able to work steadily since the war? A. No.

Q. Have you tried to? A. I have tried, yes.

Q. When you did what would happen to you? A. The leg has blistered; I have got abscesses on it and get so tired my

Mr. Berry—direct.

nerves go all to pieces and I had to lay up for a few days and at times it would be weeks.

Q. When you lost your farm in 1928, was it? A. In 1928, yes.

Q. Where did you go? A. To Lyndonville.

Q. What did you do there? A. I worked for Gene Nadeau in the garage there during the summer.

Q. Why did you give that job up? A. Well, he let me go the latter part of the summer there, or in the fall.

Q. Why? A. Because he complained he couldn't keep me the year round as he agreed to because I lost so much time; he wanted somebody he could depend on to be there every day.

Q. Then what did you try to do? A. Well, I made up my mind I couldn't hold a steady job, so I thought I would start a garage of my own, where I could work what I wanted to, and so I went in partnership with John Bishop and we rented a small garage there in Lyndonville and went into business there.

Q. What happened to that? A. Well, Bishop complained because he was having to do most all the work, and the hardest part of the work, and he wanted to get out of it, and I paid him off during the summer. I got along into the middle of the summer, and I paid him off for his share and tried to hire help to operate it.

Q. What was the result? A. Well, I—the help that I hired didn't prove out very satisfactory and I had to do work over at my own expense, that they didn't do as they should, and I lost out on that. Bad bills, and the help I had to hire, and the price I had to pay them and everything—I couldn't afford to do it. I couldn't do work enough myself or be around myself enough to oversee the thing and supervise it.

Q. When was that given up? A. That was given up in December 1929.

Mr. Berry—direct.

Q. Then what did you do? A. I didn't do anything for about two months, and then I started selling aluminum cooking utensils.

Q. For whom? A. The Aluminum Cooking Utensils Co. in New Kensington, Pa.

Q. How was that business carried on? A. That—we had to put on suppers or demonstrations as they were called, and demonstrate the cooking utensils and then make appointments to make sales calls and go out and make the sales calls the next day, or next two or three days.

Q. Who went with you on these selling trips? A. My wife went and she was the one put on the demonstrations, did the cooking, washed the dishes and did the work.

Q. Did you cover the territory assigned to you? A. No, I didn't cover the territory assigned to me—not all.

Q. Why not? A. Well, we couldn't keep going and make expenses. We couldn't put on suppers enough to keep going and keep up our expenses and make a living.

Q. During this time what about your leg? A. The leg bothered me periodically just the same as it always has.

Q. When did you move to Hardwick? A. In the spring of 1930.

Q. Were you still trying to sell for the Aluminum Company? A. Yes.

Q. Soon thereafter what happened to your sales contract with the Aluminum Company? A. We had to give it up because we couldn't keep going.

Q. Then what did you do? A. I tried selling Spot Remover there for a while, and I sold three, I think, Airway Vacuum Cleaners during that winter, and then in the spring—in March sometime—I started in for a Specialty Company, selling wrenches and special tools to the garages and machine shops.

Mr. Berry—direct.

Q. Did you cover the territory they assigned to you? A. No.

Q. Why not? A. Well, I was laid up so much time I couldn't get around and couldn't get in time enough. I worked for them seven weeks and I hadn't quite covered the territory that I was supposed to cover in four weeks.

Q. Why couldn't you do it? A. Because I had to lose so much time. My leg would get sore from carrying the sample cases and I would get lame and have to stay home for three or four days to a time.

Q. How long did you live in Hardwick? A. Seven years.

Q. After you gave up selling these tools, did you do anything of any consequence? A. Yes, I ran an air compressor for about a week for a P. W. A. job there, working on a sewer. I did two or three days work overhauling the air compressor and fixing it up, and I worked a little spare time in a garage there—well, I should say two weeks all told that summer; just a day or a few hours at a time when they needed an extra man, and just a few part time jobs.

Q. Why did you give up your P. W. A. job running the air compressor? A. Well, they tried to make me run a drill along with the—besides looking after the air compressor, and the jar of that drill or jackhammer as it is called chafed that leg so I couldn't stand it. I got in the ditch and run the jackhammer for about two hours and had to quit. They insisted I had to run it if I had the job and I put on my coat and went home.

Q. What else have you done in Hardwick to try to earn a living? A. I had a truck there for a little while and took a job to haul stone—monumental stone—off the quarry. I hauled some stone and did a little myself and hired a man to drive the truck part of the time.

Q. Did you ever load the truck yourself? A. We didn't

Mr. Berry—direct.

have to load it. It was loaded with the derrick and unloaded with a crane.

Q. What happened to that truck? A. I lost the truck because I couldn't get work enough with it that I could do to keep going.

Q. Since then did you do any work? A. I had a small filling station there that sold about a hundred gallons of gasoline a day that I run for six months.

Q. Who helped you run that? A. I had three or four different High School boys worked for me during that time; somebody worked for me all the time.

Q. Whoever worked for you did the pumping? A. Well, when they were there. I put in part of the day alone and they put in part of the day alone.

Q. When did you move from Hardwick? A. I moved from Hardwick in December of 1937.

Q. To Brattleboro? A. Yes.

Q. Did you try then working at a filling station in Brattleboro? A. Yes, I worked in a filling station—two different filling stations.

Q. What happened there? A. My daughter and I took a little roadside stand there to run. My daughter went to helping and we sold gasoline and baskets and candies and maple sugar, and all that sort of stuff. She looked after everything but the gasoline and oil, and did the cleaning up and all those things and we worked at it for two weeks and we couldn't—I couldn't stand the hours, we were having to put in there and keep on my feet as much as I had to and I quit the job. I wasn't fired but I quit the job because I couldn't stand to do it.

Q. Did your leg get blistered? A. My leg got blistered and got sore.

Q. Then what did you try? A. I didn't do anything for about two months and then went to work part time—just

Mr. Berry—direct.

Saturdays and Sundays—at Haviland's Service Station in Brattleboro, and I worked Saturdays and Sundays during August and September and into October a little.

Q. What happened to your leg even on those occasions?

A. Every weekend that I worked I blistered that leg so that I was on crutches practically all the rest of the week,—up until next Friday or Saturday. It would take from three to five days to heal up.

Q. You testified you were treated in 1920 by Dr. Tierney, and—name the other doctor? A. Dr. Bookstaver in New York in 1919, Dr. Tierney, Dr. Davis at Lyndonville ———

Q. When? A. Well, I lived in Lyndonville in 1928 and '29 and '30, and Dr. Libbey has treated me; Dr. Kinney and Dr. Ferris in Hardwick; and Dr. McSweeney that used to be at St. Johnsbury ———

Q. I mean the Dr. McSweeney at Brattleboro? A. No, his brother, and also Dr. Atwood, the Osteopath there in St. Johnsbury.

Q. Have you been to a hospital other than the Parker Hill Hospital? A. Not for any operation or anything but examination.

Q. By the way did you give up your payments on this war risk insurance policy at one time? A. Yes, I gave up the payments I claim in November. I see the records he has shows ———

Q. Why did you give them up? A. Well, I gave it up because I couldn't afford to put the money into it, and besides there was a little argument over—as to whether the payments had been made or not. At that time they claimed they hadn't been made since April. I had the receipts up until November.

Q. Later did you try to purchase insurance from the Metropolitan or some other Company? A. Yes.

Q. Tell the jury about that? A. They granted me insurance; made a notation of the leg that was missing and gave

Mr. Wright—direct.

it to me on the ground that my heart and other organs were in normal condition.

Q. Were you able to or did you keep those policies up?

A. No.

Q. And why not? A. Because I couldn't get the money to make the payments.

Q. Was the other policy you bought the Connecticut General? A. One was Connecticut General and one from Metropolitan.

Q. Were those agents eager to sell you those policies?

Mr. Curtin: Now, listen ———

Mr. Gibson: Strike that out. I want to read to the jury from this ———

Witness: There's one thing I didn't tell you—I don't know as you want it or not?

Mr. Curtin: I object to this.

The Court: He may tell it.

Witness: I cashed in one of those policies and got \$60.00 back out of it—the one with the Connecticut General; that's the only thing.

Mr. Gibson: I think you may cross-examine.

(Recess taken at 12:20 until 1:30 p.m.)

(Monday, May 15, 1939, 1:30 P.M.)

WILLIAM L. WRIGHT called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Gibson:

Q. Your name is what, please? A. William L. Wright.

Mr. Wright—direct.

Q. You live where? A. Twin Mountain, New Hampshire.

Q. What is your profession or business? A. Postmaster right now.

Q. Were you in the 103d Infantry with Mr. Berry? A. Yes, I was.

Q. Were you overseas with Mr. Berry? A. Yes sir.

Q. Coming right to the morning of June 16, 1918 will you tell us what happened on that morning? A. Well, it was right around daylight and there was some—the shells started to come over and an officer come down and asked the Corporal and myself that were there, to go down and help some boys that had been shot up, and we went down and Mr. Berry was there with a wound in his leg there, and I think we started to put the First Aid on some of the boys there ———

Q. That was in the dugout? A. In the trench—a small dugout—just a shelter there—it wasn't really a dugout and we hadn't got very far before there was a shell came over and it killed two or three around there, and it caught—wounded two or three more.

Q. What did it do to the Sergeant that was facing Mr. Berry? A. It killed him outright there, and I got hit in the leg and the arm and head.

Q. As a result did you lose your eye? A. I lost my right eye there.

Q. And got other wounds? A. Yes.

Q. How many pieces of shrapnel did you get in that ———

Mr. Curtin: Is this important?

The Court: It shows the severity of it.

A. I was hit seven times.

Q. And did you observe about how many there were in this

Mr. Wright—cross.

group of men in this trench or dugout? A. There were around six or seven of us there and there was about five of us got hit.

By the Court:

Q. What happened to Berry? A. It took—it hit him—he was hit in one leg, if I remember right, and it hit him in the other leg and took this leg—practically took it off there (indicating).

Q. That is the left leg? A. That is the left leg, and I remember he was putting—he had taken his legging and wound it around his leg there to stop the blood, and another fellow come along and was turning it with a stick; another shell come over and got him.

Q. Killed him? A. No, not outright. I think he died in the First Aid Station.

By Mr. Gibson:

Q. Do you remember anything more took place that morning? A. The shells come in there until just before we got out of there—they kind of stopped shelling.

Q. About what time of day do you say you got out? A. Sometime in the forenoon; I didn't know just what time.

Q. When next did you see Mr. Berry? A. I didn't see him again until he was in the hospital.

Q. And since his discharge how many times have you seen him? A. Twice or three times.

Mr. Gibson: That is all.

Cross examination by Mr. Curtin:

Q. As I understand it, Mr. Wright, you are one of those soldiers who were wounded at the same time? A. Yes, sir.

Mr. Wright—cross.

Q. You have only one eye now? A. That's all.

Q. You were wounded in six or seven other places? A. I was hit in the leg three times, and in the arm and chest.

Q. You are the Postmaster at Twin Mountain? A. Yes sir.

Q. How long have you been Postmaster? A. About four years.

Q. What was your occupation before then? A. I was on the railroad most of the time.

Q. And when you got out of service did you go back to work on the railroad? A. Yes.

Q. And you worked on the railroad up until the time you got appointed Postmaster? A. Not—that is, when I could, you see—when business was flush.

Q. When they had enough work for you, you worked for them? A. Yes.

Q. What was your work on the railroad? A. Well, I was baggage master and tending switches.

Q. Now after this episode in the army, when did you see Berry again? A. Well it was three—I think three or four years ago he called on me.

Q. That was the time of the last trial? A. No, it was before that he called on me.

Q. As a result of that you came down to testify? A. Yes.

Q. And you don't know of your own knowledge just what Berry has been doing since he got out of the army up until the present time? A. No.

Q. In any event with your injuries and loss of your eye and injury of your leg three or four times, in two or three places rather, and your arm, you have carried on pretty constantly with the railroad, haven't you? A. Well, in the summer time I

Mr. Haviland—direct.

did. Of course, in the winter time there was no business there. It was a summer place.

Mr. Curtin: That is all.

RANDALL HAVILAND called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Gibson:

Q. Your name is Randall Haviland? A. Right; 31 Oak St., Brattleboro, Vermont.

Q. What is your business? A. Owner and operator of a service station.

Q. Do you know Roy Berry? A. Yes.

Q. In 1938 did he try to work for you? A. He tried to.

Mr. Curtin: How long did he work?

Q. You tell the jury your experiences with Mr. Berry.

A. I became acquainted with Mr. Berry in the spring of 1938, at which time I tried to—as he had experience previously in some mechanical respects to cars, and during the spring rush I felt he would be an ideal man to put to work in my service station, so I tried to work him but due to his leg he was unable to work much over a day or two, at which time his stub was blistered, which I observed myself, so it was necessary for him to confine himself to crutches, and due to that fact it was necessary for me to hire another man and Mr. Berry was laid off.

Q. At another time has he worked for you? A. Just at this service station. The only time after that was if we got pushed up, he could work for a couple of hours to help us out.

Mr. Haviland—direct.

Q. When this stump would get blistered, how would Mr. Berry get around? He depended entirely on his crutches.

Q. Will you tell the jury just what that stub looked like after he had worked there a day or two, and as you observed it?

A. It looked as if it had been burned and the skin started to peel off. It was red, and I should say by just looking at it, it must have been very painful.

Q. Did he ever work more than two days at any one time for you without stopping? A. No, it was necessary—he never worked any longer than two days unless—if you figure according to days—he has helped us out maybe a couple hours every day, but, when he came to work eight hours a day he was never able to work over two days.

Mr. Gibson: You may cross examine.

Cross examination by Mr. Curtin:

Q. What year did he go to work for you? A. 1938—spring of 1938.

Q. You had no business dealings with him up until then? A. No sir.

Q. Where was your place? A. At the corner of Green and High Street, Brattleboro, Vermont.

Q. You never knew Berry until he moved to Brattleboro? A. That's right.

Q. How did you know about his past experience? A. Not until he came to work for me.

Q. So you didn't hire him because of his past experience? You learned of that after he went to work for you? A. That's right.

Q. How many work there? A. Three for me at the present time.

Mr. Haviland—cross.

Q. How many had you before he went to work? A. There was only two.

Q. Keep open all night? A. No.

Q. What are your hours? A. From 6:30 in the morning this time of year until ten at night.

Q. So you don't run an eight hour shift, do you? A. Why, we—take the summer—for instance, I work myself —

Q. Now answer the question. You don't run an eight hour shift on that job, do you? A. Well, I will tell you truthfully, it's kind of hard to say —

Q. Do you run an eight hour shift of work? A. No definitely, no.

Q. So when you said he couldn't work more than two days of eight hours, you don't know whether he could or not, do you, from actual experience? A. He couldn't work —

Q. You don't know from actual experience—you never had an eight hour shift, that is true, isn't it? A. Never, no.

Q. So you don't know whether Berry could work more than two days eight hour shift because he never did that, did he?

A. Well, I don't know just how to answer that.

Q. You can answer the truth, that's all. A. I don't know just exactly what hours he did work at the time.

Q. When did you find out you were to testify here today? A. About—Sunday morning I believe.

Q. Who did you talk it over with before you were called?

A. Mr. Gibson said he would like to have me come up.

Q. You told him the story you were to tell here in Court?

A. No.

Q. Didn't tell him what you were to testify? A. Just answered the questions I was asked.

Q. You were asked if he could work an eight hour day two days in a row, were you asked that? A. No.

Q. That is something different than you told Mr. Gibson

Mr. Haviland—cross.

then? Did you tell Mr. Gibson you were not on an eight hour shift down there? A. No.

Q. Did you tell him Berry's condition—did you state he couldn't work two days—eight hour days? A. I don't recall if I stated it definitely or not.

Q. Is there anything else about your testimony that would be changed as applied to working conditions at your filling station?

A. No.

Q. How much did you pay Berry? A. That I don't recall, sir.

Q. What did he do when he worked there? A. Well, did all he could.

Q. Did he pump gas? A. Yes.

Q. Was it electric or hand pump? A. Electric.

Q. Put water in the radiators? A. Yes.

Q. Drain cars? A. Pardon?

Q. Did he drain the oil in the car? A. Yes.

Q. Did he lubricate the chassis? A. Very little.

Q. Did you have a special man for lubrication? A. One of the boys working with me and myself did it.

Q. It was not because he could not do it but because somebody else did that line of work, wasn't it? A. That generally, yes.

Q. What time of the year did he work for you? A. Started in the spring.

Q. What time of the year did he get through? A. The last time he worked for me was this last winter when one of my boys was taken sick and I called him to help us out.

Q. When did he get through in 1938? A. That I couldn't say to be truthful.

Q. Did you keep any books relative to his employment?

A. No.

Mr. Haviland—cross.

Q. Have you any records when he went to work and when you paid him? A. Just my check books.

Q. Have you them with you? A. No sir.

Q. They show how much you paid him? A. Yes sir.

Q. Why didn't you bring them with you? A. I put away all my books for last year and I didn't think of it.

Q. That would give a better idea of the steadiness that he worked than your own testimony, wouldn't it? You wouldn't pay him unless he worked, would you? A. No sir.

Q. Now you stated that the stump of his leg became blistered? A. Yes sir.

Q. You saw it yourself? A. Absolutely.

Q. When was this? A. When he was working for me.

Q. When was it? A. When?

Q. Yes? A. I couldn't state what definite time it was.

Q. How did you happen to see it? A. He showed it to me—the reason he couldn't work any more.

Q. How long was he off that time? A. Well, he worked like helping us out at a weekend—like Monday he would be all in and couldn't do a thing.

Q. Will you answer the question, please?

Mr. Gibson: I submit he has answered it.

(Answer read by reporter.)

Q. Do you remember that definitely about the leg? A. Absolutely.

Q. But you cannot tell what month it was outside of the fact it was the spring of 1938? A. I don't recall for sure when I called him in.

Q. Did he tell you he had a case pending in the United States Court for this insurance money? A. When he started working for me?

Mr. Haviland—cross.

Q. Yes? A. No.

Q. Told you while he was working for you? A. Yes.

Q. That is when he showed you the stump of his leg?

A. He showed it to me to state the reason why he couldn't work any more.

Q. What time was this? Haven't you any recollection what time of the year it was? A. Possibly if you ask him he would have a more definite ———

Q. You are the witness. You were paying him, weren't you? A. That's right.

Q. You only paid him when he worked? A. That's right.

Q. Cannot you tell—it's only a year ago—1938—cannot you tell how long he worked for you from the spring of '38?

A. He didn't work steady.

Q. Did you have work for him there? A. I couldn't use him and had to hire another man.

Q. How many men did you have working for you when Berry was hired? A. Two men.

Q. When did you hire the other man? A. I believe, if I am not mistaken, I think it was in May.

Q. In May? A. Yes.

Q. When did that other man get through? A. Pardon?

Q. repeated by reporter. A. Which one was that?

Q. The one you hired in place of Berry? A. When did he get through?

Q. Yes? A. He left me in—I think it was June; had an opportunity to go into the bank.

Q. Whom did you employ then? A. I employed his brother.

Q. How long did he stay with you? A. He stayed until this spring.

Q. This past spring? A. Right.

Mr. Haviland—cross—redirect.

Q. Now you have a very good recollection of the man you hired in Betty's place going to work for you in May, getting through in June, and employing his brother in June and his brother working until spring of this year. Do you want to tell the Court and jury you don't have any recollection how long Berry worked for you? A. As I explained, he ———

Q. Cannot you answer that?

Mr. Gibson: I submit let him answer.

Mr. Curtin: That's what I want to do. You had your time at him. Let me have mine.

A. (continued) As I explained ———

Q. I asked you a question—answer yes or no—do you have any recollection how long Berry worked for you? A. Not definitely, no.

Redirect examination by Mr. Gibson:

Q. Go ahead, Mr. Haviland, and tell the jury just what you were going to say.

Mr. Curtin: I object.

The Court: That is all right. Allowed.

A. What I started to say was the fact ———

Mr. Curtin: Without any idea what the witness is to state? I think he should have a question.

The Court: No.

A. (continued) What I started to say was, in regards to not knowing definitely, was the fact Mr. Berry was unable to work for us any length of time and he did ———

Mr. Haviland—redirect—cross.

Mr. Curtin: I object to this and move it be stricken. How is he able to give an opinion as to whether Berry was able to work or not? He can tell what he saw and whether he did work or not. I don't think he has a right to testify as to the man's ability to work.

The Court: He can tell what he saw him doing or trying to do.

Mr. Curtin: That's all right.

A. (continued) As I said, Mr. Berry—the reason I couldn't state definitely when he started or got through was the fact he couldn't work for me any length of time, and when I did have a rush I used to run down to his house and ask him to help us for an hour or two. For that reason I cannot state what I paid him or just how long he worked for me.

Q. As a matter of fact did you ever talk this case over with me until yesterday morning? A. That's right.

Q. Then you told me what you knew about it, is that correct? A. That's right.

Q. I asked you to come up and tell it here? A. Yes.

Recross examination by Mr. Curtin:

Q. According to your story to Mr. Gibson just now, you went down and got Berry when you needed him? A. Just ran to the house and asked him if he couldn't help out—we happened to have a ———.

Q. You hired him when you needed his help, isn't that true?

A. When we got jammed up.

Q. But he wasn't a regular employee of yours? A. He would have been if he could have done the work.

Q. Was he ever a regular employee of yours? A. He started out ———.

Mr. Orcutt—direct.

Q. Regardless of whether he did the work or did not, at various times after that you went down and got him to help you out? A. For an hour or two.

Q. That is all you needed him for, wasn't it? A. No, I could have used him regular if he was capable of doing it, instead of hiring another man.

Q. You were going to his house and getting him to come up and help you? A. When we had rushes, yes.

Q. You did that every time you had a rush, didn't you? A. Until I had my full quota of men in the summer.

Q. You have more men in the summer than in the winter? A. Yes.

Q. Some days down there your full crew was not able to handle the business as it comes in sometimes? A. That's true.

Q. And it depends a great deal on how the cars drive into your gas station? A. That's right.

Mr. Curtin: That's all.

ROY ORCUTT called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Barber:

Q. Tell us your full name? A. Roy Orcutt.

Q. Where do you live? A. Claremont, N. H.

Q. Are you acquainted with Mr. Leroy Berry here? A. I am.

Q. Where did you live when you were acquainted with him?

A. I have known him ever since he was a small boy; born and brought up in the same town I was.

Mr. Orcutt—direct.

Q. Calling your attention to the spring of 1925 where were you living then? A. In Sheffield, Vermont.

Q. Did you at that time enter into some business deal with Mr. Berry? A. I did in the spring of 1925.

Q. Tell us what that was? A. We opened a garage in Sheffield in the spring of 1925 in partnership.

Q. Tell us what kind of garage that was—how big? A. It was just a small country garage. We done repair work on—calculated to handle all cars—all makes. I had picked up so that I was pretty good I calculated, myself, on the Ford Model T but I didn't know anything about the three speed, nor the other cars that come along—I didn't pay much attention to those and Berry had had his training for those cars.

Q. That was what the arrangement was, you were to handle the Fords and he was to handle the three-speed? A. That's right.

Q. Tell us what happened in that business as you operated it? A. We started off in business in the spring of 1925 and we got along very well for the first month, and then the business begun to get where he had to be on his feet pretty near all the time—we were open from seven in the morning until ten at night. One or the other of us was there in the night—one of us calculated to be there—and sometimes one of us had to work all night on a breakdown or something of that kind.

Q. Did you notice that had any effect on Mr. Berry, those hours? A. Oh, I know that when it come to work on his feet there, continuously, he was humped up—laying on the fender, the leg hanging off. Lots of times he would take his wooden leg off and do work on generators and like of that where he could be sitting at the bench; he used crutches after it got so sore he couldn't travel on it—then he would go back and forth to the shop on crutches.

Mr. Orcutt—direct.

Q. Did you see that stump when sore? A. I have seen that stump but it was previous to our working in the garage.

Q. He didn't take the stocking off at any time you ever saw it? A. No, I don't think ———

Q. You told us he had the harness off. Did he have the stocking off, too? A. No, I don't think he ever had the stocking off.

Q. Have there been times you had to go get him? A. Yes, I have been to get him in the summer, after we let our man go and I was trying to handle it alone, I have been to get him to help me on the three speed stuff and on the timing.

Q. What was his physical condition then? What kind of shape was his stump in and what was his ability to get about?

A. He could get around all right only it would be an awful job doing it sometimes. Of course, he had a lot of grit.

Q. Did there come a time when you took on any help there?

A. We took on—the first man we took on was along the middle or last of June we took on a farmer boy up there to help us out and save so much travelling back and forth; thought that travelling was raising the dickens with his leg, and then in July we hired a mechanic.

Q. What was the reason for that? A. The reason for that was the three speeds was coming so much and he was on his leg so much and home so much, I didn't know how to handle them, and so we hired this other mechanic.

Q. What happened the following year—the following winter after you opened up? A. We didn't do any repair work. I went in the woods to work and he took on dead storage and took care of batteries through the first part of the winter—and he wasn't to the garage—I think he intended to be there twice a week. I was in the woods but as I remember it he was in the garage to look after the batteries twice a week.

Mr. Orcutt—direct—cross.

Q. Did you have some talk with him that winter about continuing the business that spring? A. Not in the winter. In the spring when we begun to think about opening up, we begun to have conversation—Saturday when I got home—Saturday night—he would come down to the house, and Sunday we would come down there and talk what we would do in the spring.

Q. What about his physical ability—was his stump the subject of conversation? A. I think he had been off that leg for quite a while just before our last conversation in the spring, and he made the remark that he guessed that he couldn't continue.

Mr. Curtin: I object.

Q. He did talk to you about the leg? A. Oh yes, he said that he could ———

Mr. Curtin: I object.

Q. As a result of that conversation what happened with Mr. Berry's share of the business that spring? A. He discontinued and I took on another man. He sold out his part to a man by the name of Davison.

Cross examination by Mr. Curtin:

Q. What year was it you were in business with Berry?
A. 1925.

Q. Wasn't it 1922 or '23? A. 1925, in the spring of 1925.

Q. How many times was it that, of your own knowledge, he had boils on that stump? A. How many times from my own knowledge?

Q. Yes, while you were in business with him? A. Well, I don't know about the boils on the stump.

Q. Well ———

Mr. Orcutt—cross.

Mr. Barber: I think he testified he never saw it.

Mr. Curtin: I will ask him now.

Q. How many times was his leg bothering him that prevented him from coming in and doing his share of the work?

A. I don't know just how many times but I know there was a number of times.

Q. Have you any idea—give us an idea—approximately.

A. Well, I know there was one whole week that he was off.

Q. That's once? A. And I know of—well I will say there was half a dozen times that I had to go and get him and take him down there, and he would prop himself up on a fender—with his leg off—and didn't have his leg with him at all.

Q. You say there was a half a dozen times in two years he was off on account of his leg?

Mr. Gibson: One year.

A. (continued) Half a dozen times from May until November in 1925.

Q. How long were you in business with him? A. In business from—I think we went in in May 1925 and then I wasn't with him for—I think I went into the woods in November.

Q. Well, Mr. Orcutt, I will show you this paper dated Sept. 25, 1935 and ask you if that is your signature appearing there—"R. L. Orcutt"—right here (indicating)? A. Yes.

Q. That is your signature appearing on the first page? A. Yes.

Q. Now let's get together on this. My name is Roy Orcutt, and Mr. Ruggles, to whom I am giving this statement, has informed me that he is a Special Agent of the F. B. I. and this statement is in connection with the war risk insurance case involving Leroy A. Berry. Berry and I were in partners in running a

Mr. Orcutt—cross.

garage in Sheffield, Vermont for approximately two years, in 1922 and 1923 ——— A. Just a minute! I think when it reads on further there you will find ———

Q. Wait a minute—we will get to that; we will go right through the statement, so take your time. So in September 25, 1937 your recollection was that you went into partnership with Berry at Sheffield, Vt. for approximately two years in 1922 and 1923, that is true, isn't it? A. That is what I told that man, yes.

Q. And you were told this statement was in connection with Berry's war risk insurance case, weren't you? You had an understanding what it was all about when he interviewed you, that is true? "During this period the garage was open from about 7 A.M. till 9 P.M. six days a week"—is that how it was open—is that true? A. That's what I told him there.

Q. Well, is it true? A. Well, it was open—that is what it was supposed to be—that is what we was supposed to be— from seven until nine or ten.

Q. The only two at the garage were you and Berry? A. Just Berry and I at the time we opened.

Q. "When Berry was feeling all right he would be at work at 7 A.M. till 9 P.M. He would be working as a mechanic part of the time and part of the time he would drive out on the road selling. We ran a second hand car Sales Department in connection with the garage and Berry was more or less a salesman. He also did considerable mechanics work in the garage. There were times when Berry would have large boils on his leg where the stump fitted on, and at times these were serious enough to keep him from working at all. Other times he would go out driving through the country selling, without his leg. Sometimes when this was the case his wife would go with him. In general he was regularly attending work except for the periods as I have stated above when he had infections, which kept him for working. I did the repair work on Fords and Berry was a specialist

Mr. Orcutt—cross.

on Chevrolet repair work. It is my recollection that Berry used a crutch to help him get around. We worked together for a period of about two years and our business relationship was then terminated because we sold out." So it was not Berry sold out but both of you sold your business, isn't that true? A. I don't recollect it was true to start with. I sold to Davison later.

Q. September 25, 1937 your recollection was you both sold out at the same time, wasn't it, according to this statement? Wasn't that your recollection then? A. That is what that says there.

Q. Of course, you were telling the truth when you made this statement, or thought you were, weren't you?

Mr. Gibson: Who made that statement?

Mr. Curtin: He did.

Mr. Gibson: Who wrote it?

Mr. Curtin: I will ask him that later. I don't think he did.

Mr. Barber: I don't think so either.

Q. "During this time we just about broke even—no net profits being realized, but if it had not been for Berry's pension and help he received from his brother, he would have nothing to live on. Mr. Ruggles read this statement to me and it is true." Then your signature. He did read it to you? A. He read it to me.

Q. It was true, wasn't it? A. That 1922 and '23—when I told him I wasn't positive of the years. He told me to notify somebody in Rutland I think, the years I was in business, and I think I did—to somebody—I don't remember who it was but someone I wrote to on the next day, or the next day but one and corrected my 1922 and '23 to 1925. He told me right out there in the sun ———

Mr. Orcutt—cross.

Q. Will you answer the question I asked you? Then in September 1937 your recollection was it was 1922 and '23, isn't that true? A. That is what I told him then. I told him I might not be right about the years.

Q. Well, it is true that you did work on the Ford cars and he was a specialist on the Chevrolets? A. That's right.

Q. He did all the work on the Chevrolets? A. No, not all of it.

Q. Did you work on the Chevrolets? A. I did.

Q. Did he ever work on the Fords? A. He did.

Q. And you did an even amount of business, both of you, isn't that true? A. What's that?

Q. repeated by reporter. A. When he was able to and there, he was a better man than I was.

Q. That is true, he was a good mechanic? A. He's a good mechanic if he was able to do it.

Q. You met him, whether it be 1922 or later, and you knew Berry and had known him for a long time? A. I had known him all my life.

Q. You knew he had a leg off? A. I did.

Q. You knew he had gone through vocational training and took a mechanic's course? A. I did, that is why I took him in partnership with me.

Q. Knowing all that you went into partnership with him and started a garage and you stayed in partnership with him for two years? A. No.

Q. Well, according to this statement you did? A. Well, it's a part of two years.

Q. You stayed in partnership with him for two years —

A. I stayed in partnership with him for a part of two years.

Q. — and during that time that was your sole means of support, that garage? A. That was.

Q. And you were married? A. I am.

Mr. Orcutt—cross—redirect.

Q. Got a family? A. I was at that time—I had a family. My wife is dead now, and I have five children.

Q. So in 1922 and '23—around that time—you were married and had a family to support? A. I did.

Q. You supported your family during the period you were in partnership with Mr. Berry? A. Well, what they had to eat. They didn't any of them die during that time.

Redirect examination by Mr. Barber:

Q. That statement that Mr. Curtin showed you—did you write that statement out? A. Did I write it? No.

Q. Do you know who did write it? A. Well, there was a Deputy Marshal I expect.

Q. Is that the fellow over there? A. That fellow over there? Well, I shouldn't recognize him today. Can I ask him a question?

The Court: Yes.

Witness: Didn't I tell you I wasn't positive of that '22 and '23?

Mr. Ruggles: No, I don't recall that you did, Mr. Orcutt.

Q. Did you write to someone in Rutland about that date?
A. I did.

Mr. Barber: Where's that letter?

Mr. Curtin: We are not from Rutland; we come from Boston.

Mr. Barber: You handle this territory, don't you?

Mr. Curtin: We never got any letter. He must have written a Marshal.

Mr. Orcutt—redirect—recross.

Witness: I don't know who it was but I was supposed to write to somebody to change that date, if I thought it should be, which I did, but I don't know who I wrote to.

Q. Calling your attention to what you said, you went into the woods in November? A. Yes.

Q. How long did you work there? A. All winter.

Q. And do you recall what you earned that winter in the woods? A. Do I recall what I earned?

Q. Yes? A. Oh, I got—no, I don't remember just that winter, but I think we got \$1.25 a day and our board.

Q. Did you put any part of that money into the garage business? A. Not any as I remember it because it took all of that and some besides to feed my family.

Q. Did Mr. Berry sell out to you, and you sell to Davison or—what is your recollection on that? A. My recollection on that is he sold his part to Davison, and then I sold my part afterwards, but I may be all fogged up on that.

Mr. Earber That is all.

Recross examination by Mr. Curtin:

Q. The garage was operated when you were in the woods?

A. No, only just for batteries.

Q. It was in existence? A. In existence.

Q. You came back from the woods and went into the garage again? A. I came back and went into the garage again in the spring.

Q. And during the time in the woods, Berry took care of the garage, such business as there was? A. He was there once or twice a week to look after the batteries and dead storage.

Q. This statement was given September 25, 1937 and you

Dr. Tierney—direct.

say now you wrote to somebody in Rutland telling them to change those dates—so you wrote after that statement was made out?

A. Yes, I wrote—I don't know whether the next day or the next day but one, but I know I went home and told my wife what happened. She said "you go right to your records in the desk and you will find it was 1925".

Q. Your statement is you wrote to somebody in Rutland but don't know who it was? A. Yes.

Q. And don't remember the office? A. No.

Q. But you remember it was 1925 and '26 now rather than 1922 and '23? A. It was 1925.

Q. Yet you have no recollection who you wrote a letter to two years ago? A. No.

DR. JOHN P. TIERNEY called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Gibson:

Q. State your name, please. A. Dr. John P. Tierney.

Q. Where do you live? A. St. Johnsbury, Vermont.

Q. And your profession is what? A. M.D.—Medical Doctor.

Q. How long have you practiced medicine in Vermont? A. Since 1913.

Q. All that time in St. Johnsbury? A. Approximately three years in the town of Hardwick.

Q. And the balance in St. Johnsbury? A. And the balance in St. Johnsbury.

Q. In the year 1920 did you hold some official designation from the United States Public Health Service? A. I did.

Q. What was that? A. Assistant Surgeon in the United States Public Health Service.

Dr. Tierney—direct.

Q. And during that year did Mr. Leroy Berry come to you in your capacity as Public Health Officer? A. He did.

Q. Did you make an examination of him? A. I did.

Q. Did you submit a written report thereof to the Service?

A. I did.

Mr. Gibson: May we have that report, please?

Mr. Curtin: When we have reports you get them, or when they give them to us.

Mr. Gibson: I know that is what you say.

Q. Doctor, looking at Pltfs. 1-A, calling your attention to the date on that, can you refresh your recollection and tell us when it was you made this report? A. This is dated July 16, 1920.

Q. Now I want to ask you if after you made this report, Pltfs. 1-A, you later that same year and at other times, treated Mr. Berry in a medical way? A. That's right.

Q. And how many times would you say after July 16, 1920—that is the date of this report—that you treated him? A. This is to the best of my knowledge ———

Q. Yes? A. ——— I have no records here ———

Q. Yes? A. ——— I treated him at least ten or fifteen times in my office and at least four times at his home which was located in Charles St., St. Johnsbury, Vermont.

Q. That was all during the year 1920, was it, or did it carry over? A. I should say it carried over, sir.

Q. So you think it carried over into 1921, your treatment? A. Yes sir, I should say that it did.

Q. Did you after examining him the first time recommend some hospitalization for him? A. During the year 1920 I believe that I did recommend hospitalization.

Q. What did you find as you recall it, the first time that

Dr. Tierney—direct.

you examined him? If you have some records in your pocket you wish to refer to to refresh yourself, I think you may.

The Court: You may.

A. At that particular time he had an amputated left leg seven inches below the knee—or you might say the upper two-thirds of the leg—going on crutches at that particular time ———

Mr. Gibson: May I ask if the Government has the hospital record for the Parker Hill Hospital in 1920?

Mr. Curtin: If we have it, you can have it.

A. (continued) That would be April 28, 1920 Parker Hill Hospital, Boston.

Q. That is, you recommended at that time that he be sent there or what? A. He was there at that time.

Q. He was there at that time, and after he came back you treated him, did you? A. Yes, he was discharged from Parker Hill May 8, 1920.

Q. And you treated him from May 8, 1920 on into 1921 sometime, is that so? A. Yes sir.

Q. And did you treat him before he went to Parker Hill Hospital? A. Yes sir.

Mr. Curtin: Here you are (handing report to Mr. Gibson).

Q. And what was the trouble with his leg before he went to the Parker Hill Hospital? A. He had an amputated left leg, possibly seven inches below the knee, that was not properly covered by muscle; therefore, he didn't have a sufficient pad, but what he had quite an exposure to superficial and deep vessels—nerves and blood vessels.

Dr. Tierney—direct.

Q. Did he have some boils or nerve abscesses at that time on the end of his stump? A. That's right.

Q. Is that what you recommended he go to the hospital for?

A. Yes. I recommended later that he would again frequent this hospital for better adjustment of the artificial limb, on account of not sufficient padding.

By the Court:

Q. By "padding," do you mean on the end of the leg, or on the artificial leg? A. Your Honor, I mean padding by muscular tissues—not artificially.

By Mr. Gibson:

Q. When you first treated this man did you make some prognosis as to his future, Doctor? A. I always do. I did make a prognosis in 1920.

Q. That was in July of 1920? A. That's right, sir.

Q. And your prognosis at that time was what? A. My prognosis at that time was "Excellent."

Q. Now after that you continued to treat him, did you?

A. I did.

Q. And did you after you continued to treat him and observed him over a period of time, change your decision?

Mr. Curtin: I object to the line of questioning; this is his witness.

The Court: Yes.

Mr. Curtin: And the question calls for only one answer and he's putting that right in the Doctor's mouth. I don't think this doctor has to be told what to say.

The Court: I think that is all right. How can you find out if the man changed, unless you ask him?

Dr. Tierney—direct.

Q. repeated by reporter. A. I did.

Q. And what did you determine after you had treated him for a lengthy period of time, as to his future with this limb? A. If you will permit me to refer to my records again?

The Court: Yes.

A. (continued) Question 17 on my records asked the question "What is the degree of his vocational handicap resulting from his disability?" My answer to that question was "100 per cent".

Q. And later—what I am still trying to get at is, Doctor, after you made this report in July 1920, you then continued to treat him? A. I did.

Q. And you finally made a diagnosis as to what condition that limb would always be in, didn't you? A. I did, sir.

Q. What did you ultimately arrive at as your conclusion?

A. My conclusion was the last time that I saw that limb—that it wouldn't improve.

The Court: The leg was off, wasn't it?

Q. Give your reasons for that conclusion? A. The leg was off when I saw him the last time.

Q. repeated by reporter. A. My conclusion was that it was poor surgery.

Q. And explain to the jury what you mean when you say "poor surgery"? A. I mean by poor surgery—if a man's leg—it might be possible that a man's leg would have to be taken off seven inches below this knee of mine, and this fat muscle of mine was gone—in a surgical sense it would be much better if the surgeon had taken the leg off seven inches above the knee, whereby he would have a natural coverage instead of an artificial one made out of leather or cloth or whatever these artificial men do with. This big heavy muscle (indicating) would come up around here

Dr. Tierney—direct.

and give the individual, whoever it might be, a natural coverage, the same as it would be amputating a man's leg here (indicating), but here (indicating) there's very little muscular coverage; that is, of your own leg, and therefore these (indicating) not being covered properly, I don't know how many artificial legs this man has had—but I believe they all irritated him for the simple reason the ———

Mr. Curtin: I object. He says he don't know how many artificial legs he has had and he thinks they all irritated him, and move to strike out.

By the Court:

Q. Tell how it was irritated at the time you saw him with the particular leg that he was using then. A. Yes sir.

By Mr. Gibson:

Q. Tell how it was irritated. A. The artificial leg that was supplied to him was not properly padded, whereby these nerves which are very painful when exposed to the surface, and they in turn caused ulcerations, blisters, redness, inflammation, whereby I had to open two or three all pus abscesses at the time. Then he would have to go along to the period whereby this redness would disappear; he would be on crutches at that time. That was due to the ill-fitting artificial leg and the lack of coverage to the nerves of the leg at that particular time that I saw this man. That is the best of my knowledge.

Q. Let me ask you a question about the nerve ends that were severed down here where this stump was cut off. Assume a man had been through a severe nervous strain and had been in a dugout when three or four men were killed; he himself had his leg blown practically off and had undergone that shock, and then the leg was amputated and left in the condition that you observed

Dr. Tierney—direct.

it, as you observed it there in 1920—in your opinion what was the condition of those nerves down around that stump?

Mr. Curtin: How were they when he examined him?

Q. Well, yes.

Mr. Curtin: You don't have to assume anything there.

Q. Tell how those nerve ends were when you examined him? A. They were very close to the surface.

Q. What effect would it have on a man's nervous system if he had been through a severe experience—that is, of being in the dugout when a shell exploded and killed three or four men and practically blew his own leg off, and the leg was amputated in the evening and this happened in the early morning ———

Mr. Curtin: I object. We are not interested in any man. We are interested in Mr. Berry's ———

Q. Assuming those things happened to Mr. Berry, what effect would that have ———

Mr. Curtin: I object to any assumption. This man is a fact finding doctor. What did he find?

The Court: You mean as directed to his nervous system in general?

Mr. Gibson: Yes.

The Court: You may tell that.

Q. repeated by reporter. A. I should consider this shock of the general nervous system a severe one at the time; a perma-

Dr. Tierney—direct.

ment shock and a shock of the nervous system that would increase as age came upon us.

Q. Now would that also have an effect, the fact that the man's nervous system had been shocked and damaged, would that have an effect on these nerve ends around the stump near the surface, when you examined that stump? A. To the best of my knowledge it would have.

Q. And would that cause the leg to be more painful and irritable?

Mr. Curtin: I object. He is leading.

Q. What effect would that have on the stump as to ———

A. It would be a more severe pain to this particular case or one similar to it than it would be to the normal individual on the street, that would have his leg amputated by the railroad, for instance. That is to the best of my opinion.

Q. Doctor, you assume that this man was in a dugout in June of 1918 when a shell exploded and killed three or four men in the dugout and practically blew his left leg off, and the man had already received other wounds in other parts of his body; that this happened at four o'clock in the morning and that he was about 10:30 taken to the field hospital and finally taken back to the evacuation hospital around six o'clock in the evening, and was then shortly thereafter operated upon, leaving the leg in the condition as you observed it in 1920, and after observing that over a long period of time what is your opinion as to whether that man because of this experience, would ever be able again to work continuously at a gainful occupation?

Mr. Curtin: I object. It is the issue for the jury.

The Court: I don't think so on this nervous disturbance.

Dr. Tierney—direct—cross.

Mr. Curtin: Of course, it goes to the weight, too. I also question the Doctor's qualifications to pass on a nervous condition. He hasn't stated any background or educational experience.

The Court: Twenty years practice ———

Mr. Curtin: I know it but this—he said he was a surgeon. That's the only testimony he has given in the line of medical work.

The Court: No, he said he was a Doctor of Medicine—M.D.—I will let him answer that.

Mr. Curtin: Note an exception on the ground I stated.

Q. repeated by reporter. A. I don't believe he ever will be able to work continuously at a gainful occupation.

Q. Do you think he would have been at any time since this wound was received?

Mr. Curtin: I object for the same reasons stated before. Exception.

Q. repeated by reporter. A. I couldn't see where this man could be in any condition to resume a gainful occupation since the wound was received.

The Court: All right—cross examine.

Cross examination by Mr. Curtin:

Q. Have you any records, Doctor? A. I have two papers.

Q. May I see them? A. Yes sir (hands papers to Mr. Curtin).

Q. When is that dated (indicating paper)? A. July 16, 1920 I think.

Dr. Tierney—cross.

Q. This is a copy—the first one you handed me is a copy of the examination that you put in evidence? A. Date of original examination is July 16, 1920 I believe.

Q. Now this is your Pltfs. Ex. 1-A—isn't that the same date as this examination here which you just handed me—July 16?

A. July 16—they're duplicates, aren't they? That's the original (indicating). I always keep the original. I thought I had the original all the time.

Q. You sent that in to the Government, didn't you, Doctor?

A. That's right.

Q. And there's something on this that you kept that is not on that, isn't there? A. There's something on the back of there that is not on the back of this.

Q. When was that written, Doctor? This statement here (indicating)? A. I don't know—I couldn't tell you.

Q. Do you want the court and jury to think that was written on July 16, 1920 or January 31, 1920? A. Do I want the court to think what?

Q. Do you want the court to think that that was written on January 31, 1920—that's the date ——— A. January 31, 1920—I certainly do want the court to believe that is true.

Q. So you wrote this and then in July you wrote that on the front? A. The 16th of July.

Mr. Curtin: I wish to offer this Your Honor.

The Court: Admitted. (Copy—marked Gov't Ex. A-1.

Q. Doctor, were you interviewed by a Government Agent relative to this case? A. By a Government Agent?

Q. Yes? A. Yes sir, down in Rutland.

Q. And that is your signature, Doctor, down here is your signature (indicating)? A. That's right.

Dr. Tierney—cross.

Mr. Curtin: I wish to offer this.

A. (continued) Just a minute—do you mind if I look this over? Yes sir, that's right.

Q. Now Doctor, what was the diagnosis that you gave on July 16, 1920, on which to base that questionnaire—amputation of the leg, was it? A. My diagnosis?

Q. Yes. A. Was amputation—that's right.

Q. Nothing in there about his nervous system, is there, Doctor? A. There was nothing, no sir, not for me to answer.

Q. You made no diagnosis off your examination paper?

A. That's the original (indicating)—here's this.

Q. Looking at Pltfs. Ex. 1-A, did you make any diagnosis other than amputation of the leg? A. Did I make any diagnosis?

Q. On that date, other than amputation of the left leg?

A. That's right.

Q. Now, Doctor, getting back to this paper on which you said your signature appears—there is a question here—Name of veteran—Leroy A. Berry. How long have you been practicing medicine? Twenty-five years. Did you examine veteran personally? Yes. Is report signed by you? Yes. Was history of the veteran taken from him personally? Yes. What was the purpose and basis for the treatment? Compensation and vocational training. Have you examined the veteran in the capacity of a Government physician or private physician? Government. What was your diagnosis? Amputation of the stump. Prognosis? Excellent. Is it your opinion that the claimant was suffering from any impairment of mind or body at the time of your examination which would render it impossible for him to follow continuously any substantially gainful occupation? Your answer was "no", wasn't it, Doctor? A. That's right, sir.

Q. "If either of the two preceding questions is answered

Dr. Tierney—cross.

in the negative, what substantially gainful occupation do you believe the veteran could have followed with reasonable regularity at the time of your examination or at some subsequent time?" Your answer was "auto mechanic"? A. That's right.

Q. You signed that on January 20, 1937—right Doctor?
A. 19—what?

Q. 1937? A. That's right.

Q. And it was witnessed by ——— A. Just a minute, I want to look at that date.

Mr. Curtin: I should think you would look at it.

A. (continued) That's the date here, Mister ———

Q. It was signed that date? A. That date is January 20, 1937—that's right, that's the date on there. Of course, this was made out by somebody else besides myself—with the exception of how long I had been in practice—that's my writing, and the school I graduated from is in my writing.

Q. And the signature is yours, too, isn't it, Doctor—"John Tierney"? A. "Auto mechanic" is my writing and my signature is mine, but all other writing is by somebody else.

Q. Dr. John P. Tierney is your writing? A. That's right.

Q. No question but what it is your signature? A. That's right, I agree to that.

Q. You did sign that statement?

The Court: Oh, he's told you that several times.

A. Yes.

Q. Were you telling the truth on January 20, 1937 or are you telling the truth now, Doctor? A. I am telling the truth now, sir,

Dr. Tierney—cross.



Q. So you were not telling the truth on January 20, 1937?
A. I intended to tell the truth but evidently I didn't see "1937" and why I couldn't write in 1937 as well as I could write in "auto mechanic" and my own name is something I don't understand.

Q. You sat and had a talk with Mr. Pelletier when he had that visit with you? A. In the front part of my office.

Q. Do you recall telling him you were ordinarily sympathetic toward veterans but this fellow was a chiseler? A. No, or any other veteran.

Q. You never did? A. No.

Mr. Gibson: Is Mr. Pelletier here to back that up?

Mr. Curtin: You might send out to Seattle for him.

Mr. Gibson: I would like to know if he made that out and would like to have him here.

Q. How long did Mr. Berry live in St. Johnsbury? A. I don't know, sir.

Q. What time did he come to St. Johnsbury? A. I don't know, sir..

Mr. Curtin: I wish to offer that, Your Honor.

The Court: Admitted. (Gov't Ex. A-2.)

Q. When was the last time that you saw Berry as an attending physician? A. I cannot answer that question directly, sir. It was sometime when he lived on Charles St. in St. Johnsbury, Vermont.

Q. And ——— A. I haven't any records with me, sir.

Q. Have you any records at home besides what you have there? Have you any other records? A. I couldn't answer that question neither.

Dr. Tierney—cross.

Q. I mean relative to Berry—have you any other records besides what you have there? A. No sir.

Q. Does it appear in any record either that you have in your hand or that was produced here by Mr. Gibson from the Veterans Bureau file, that a diagnosis of a nervous or mental condition of this veteran was made when you were treating him?

A. It does not, sir.

Q. Your examination was going to be the basis for the amount of compensation he was to get from the Government, wasn't it? A. What's that again?

Q. repeated by reporter. A. I don't know anything about it.

Q. You were examining Berry for the Government at that time? A. That's right, sir, I was the Government Examiner.

Q. These reports went into the Veterans Bureau? A. That's right.

Q. They were used in computing the amount of compensation to be paid the veteran? A. I think they were, sir.

Q. You were interested in seeing that the veteran got the proper diagnosis at that time, weren't you? A. I tried to be.

Q. And at that time you only made the diagnosis of amputation of the leg? A. That's true, sir.

Q. Now Doctor, on direct examination you stated that it would be better for Berry if he had his leg cut off seven inches above his knee? A. When it was first done it would have been much better, sir.

Q. Did you say a man is better off with just a stump above the knee rather than the rest of his leg, including his knee-joint?

A. I think it would be sir, when there's not enough of padding of the muscle.

Q. Have you seen the leg he's got now—wooden leg? A. No, I haven't seen it, sir.

Q. Well, if the stump doesn't come in contact with any-

Dr. Tierney—cross.

thing, is there any reason why it should become sore? A. If it doesn't come in contact with anything artificial, and it doesn't become sore, it will be most fortunate.

Q. At the time of your examination he had no apparent soreness there, did he? A. Very close to it, sir; very close to it.

Q. Well, did he? A. He didn't have any ——— what do you mean, here (indicating)?

Q. He didn't have any blisters? A. At this time?

Q. Yes? A. No, not at this time—shortly afterwards.

Q. You haven't any record of it here (indicating paper)?

A. I haven't here and I don't know as I have anywhere.

Q. Is there any reason if this man had a leg that did not irritate that stump—any reason why this man cannot work, from what you found at your examination? A. I just testified to the best of my knowledge, sir, that this man, as far as I know, was totally disabled.

Q. Now, Doctor, what in your records indicates a condition that would stop this man from working? A. Oh, a lot of things, sir, in eighteen years. A disabled veteran can mount up with most anything in a nerve—in a shell-shocked condition.

Q. Look at your examination? A. I have seen it, sir.

Q. Is there anything in your examination that would indicate this man was suffering from shell shock? A. It didn't when I looked at him, no sir.

Q. Your findings and examination did not indicate it? A. No sir.

Q. You had a history of having the leg shot off in France when he visited you? A. That's right.

Q. You had all this history that Mr. Gibson gave you today, when you answered that question that he was not able to work—you had it when Berry went to see you in 1920? A. If they asked me the same thing two years ago I would have answered

Dr. Tierney—cross.

it the same way I answered it today—in Rutland—but nobody asked me the question.

Q. You had that history when Berry went in for treatment from you in St. Johnsbury in 1920? A. I had the amputated stump to take care of.

Q. "Toul Sector, June 6, 1918 hit below knee by high explosive; amputation of left leg seven inches below knee, at evacuation hospital—apparently No. 6; April 28, 1920 operated on stump at Parker Hill Hospital; artificial limb not as satisfactory on account of shrinking of amputated stump, size and weight of leg". That's the brief history you got at that time? A. That's right.

Q. Then you gave him a physical examination: "Stump of left leg all healed and not painful on pressure". It was not painful on July 16, 1920? A. It was not that day, no sir.

Q. "Stump is seven inches below knee. Examination of eyes, ears, nose and throat normal; chest and heart sounds normal; urine—some abbreviation here—10.14" ——— A. Yes, that's urine.

Q. "Albumin and sugar negative". You gave him a pretty thorough examination that day, didn't you, Doctor—eye, ear, nose, throat, heart, lungs, urine? A. The same examination I gave all ex-service men.

Q. Read to the jury from that paper any history or rather any finding of yours that indicates the presence of a nervous or mental condition of that veteran on that date? A. There's nothing states there on this paper, sir.

Q. You never made any such finding on that date, did you? A. In 1920?

Q. Yes? A. No, I did not.

Q. Have you any record that at any time you ever made a finding of the presence of a nervous and mental condition in Berry while you treated him in 1920 and '21? A. I don't know as I have and I don't know anything about it.

Dr. Tierney—cross—redirect.

Q. And, Doctor, didn't you recommend that he be admitted to vocational training? A. I did, I recommended that. That is all he could do.

Q. "Does his physical and mental condition render training feasible?" You said "Yes"? A. That's right.

Q. His previous occupation was farmer, wasn't it, at that time? A. That's right.

Q. You didn't recommend men that couldn't work for training, did you, Doctor? A. Well, he could sell pencils on the corner of the street, or shoe strings, couldn't he? That isn't training. He could sit on a bench and fool over a motor. At the time I examined this man I thought he was competent of doing that.

Q. On January 20, 1937 you thought he was competent to be an auto mechanic? A. I recommended him to the vocational training man.

Q. On January 20, 1937 when you made that statement that I showed you, you didn't have in mind selling pencils when you put down "auto mechanic", did you? A. I don't know what your term is—an auto mechanic—whether changing tires or working on the motor of a car.

Q. What did you mean? A. I meant he could probably sit on a bench and fool around with generators.

Q. Is that the kind of auto mechanics you have your work done by? A. Oh, no sir.

Redirect examination by Mr. Gibson:

Q. Just to clear up the record—after you made this report in July 1920 you commenced to treat him personally, didn't you? A. That's right.

Q. It was after you commenced to treat him personally and saw him over ten or twelve visits—may I ask then did you observe these blisters come on his leg? A. That's right.

Dr. Tierney—redirect.

Q. And in July 1920 when you made this examination there were no blisters on his leg? A. That's true.

Q. But later in the course of your treatments you observed those come? A. That's right.

Q. That is when you changed your mind about his condition, is that correct? A. That's right.

Q. As far as this statement—A-2—is concerned, this was written out by some lawyer that came to see you, was it?

Mr. Curtin: I object.

Mr. Gibson: Let him answer the question, this is rebuttal.

The Court: That does not justify your leading questions, does it?

Q. Was there a man came around, some lawyer that came around from the Department of Justice to see you sometime in January of 1937? A. There was a man from the Department of Justice that came to my office but in regards to the year, I wouldn't testify to that.

Q. Was that when you signed this paper Government's A-2? A. I wouldn't take an oath to that, either; only that is my true signature.

Q. Have you any real recollection of what was said at that time—what you told this Government man at that time? A. No, I cannot recall what I told him.

The Court: Isn't that enough?

Mr. Gibson: Yes, that's enough.

(Recess)

Q. Dr. Tierney, did you examine Government's A-1 and Plaintiff's 1-A during this recess? A. No.

Dr. Tierney—redirect—recross.

Q. Did you look them over? A. These papers (indicating)? Yes.

Q. Now will you explain what this one dated in January 1937 is, to the jury? A. This paper dated in 1937, signed by me, made out mostly before I signed it, but as I look back on this thing, it refers back to this of July 16, 1920.

Q. Was the data put in on the one made in 1937, put in from the paper which was made in 1920? A. That's right.

Mr. Curtin: That paper stands for itself.

Q. The answers you wrote in your handwriting were answers that couldn't be put in, were they, from the paper of 1920?

A. That's right.

Q. And when it was brought in, it was brought in as having been copied from the one made in 1920? A. Yes sir.

Q. Does it in so many words refer back to the paper made in 1920?

The Court: Read it, Gibson, it shows for itself whether it does or not.

Mr. Gibson: "Name of veteran. Name of doctor. Date of examination 7/16/20. Then it goes down—Was your examination—referring back always to 7/16/20, and what was your prognosis in 7/16/20—was Good—and it asked what he recommended at that time as a vocation, and he said "auto mechanic".

The Court: That's what he did in '20?

Mr. Gibson: Yes; this paper in '37 refers right back. That is all, Doctor.

Recross examination by Mr. Curtin:

Q. When this man came in to interview you—Mr. Pelletier—he told you who he was? A. I believe he did.

Dr. Tierney—recross.

Q. He sat down with you and talked to you about your examination of July 16, 1920? A. That man stood up in the office as I recall it, all the while he was there having the conference.

Q. Did he talk to you about this examination you made in July of 1920? A. He might have—I don't have any records in my office.

Q. Have you a recollection of the visit of Mr. Pelletier on January 20, 1937, in your office? A. I have now, of some man coming into my office representing the Government, yes sir.

Q. He talked over with you the matter set forth on this paper, didn't he? A. I imagine he did.

Q. And haven't you any recollection of the questioning and discussing that went on between you and he? A. No, I couldn't say.

Q. In any event he did visit you?

The Court: Yes.

Q. And you did examine the man on July 16, 1920? A. Yes.

Q. And you graduated from the University of Maryland? A. That's right.

Q. And you were practicing your profession about twenty-five years at that time? A. Yes.

Q. You were employed by the Veterans Administration as a Designated Examiner, fee basis, or still are? A. I at that time was in the United States Public Health Service.

Q. But at the time of the interview you were Designated Examiner for the Veterans Bureau—that is the interview in 1937? A. That's true.

Q. You are the only man he could get that information from? A. That's right.

Dr. Ripley—direct.

Q. So all that is true?

The Court: Yes.

A. Yes, all that is true.

The Court: All right—next witness!

DR. HORACE G. RIPLEY called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Gibson:

Q. State your name, please. A. Horace G. Ripley.

Q. You live where? A. Brattleboro, Vermont.

Q. What is your profession? A. Physician and superintendent of the Brattleboro Retreat.

Q. In the Brattleboro Retreat how many cases do you handle per year? A. About 500 commitments and 800 population—permanent population.

Q. Do you examine a great deal—are you an M. D.? A. I am.

Q. And also do you examine for nervous troubles? A. I am a psychiatrist and neurologist.

Q. You are the head of that large institution at Brattleboro? A. I am.

Q. Now in December of 1937 did Mr. Leroy Berry come to you for observation? A. For examination.

Q. Will you tell the jury what examination you made, etc.? A. I examined him nervously and for the wounds that he had just received and the amputation of the left leg and found him to be in a nervous state, that the leg was at that time red and

Dr. Ripley—direct.

some blisters on it from irritation and very sensitive. He said that he ———

Mr. Curtin: I object to any history at this time.

Mr. Gibson: Yes, leave out what he told you, but tell what you found, Doctor, and your decision and opinion.

A. (continued) I considered that he was suffering from a— from probably a neurosis due to shock which he had received while in Service.

Q. Tell what you observed about that stump? A. The stump was red and some blisters—a few blisters on it, and sensitive.

Q. Now what about the pad on the bottom of that stump? A. Very poor.

Q. And what effect did that have on that stump? A. That would make a sensitive stump.

Q. What about the nerve endings on that stump? A. They were exposed—were not properly covered with the flap or the pad that you turn over always in a surgical operation.

Q. A man who has had his nervous system impaired and has his nerves exposed as this one when you examined him, what effect would that have on that leg? A. Well, it would have a detrimental effect. It wouldn't be comfortable.

Q. With that leg in the condition you observed it, is the man able, in your opinion, to work steadily at a gainful occupation?

Mr. Curtin: I object.

The Court: Excluded. He can tell the extent of his nervous disturbance—whether much or little, severe or slight.

Dr. Ripley—direct.

Q. In your opinion, Doctor, could he stand on that leg, even with the artificial limb, for any considerable length of time? A. He could not.

Q. Why not? A. Because of the pain and the discomfort and the irritation which was caused by the standing.

Q. And what part of that would the nerve endings around that stump play? A. They play a great part; they're very sensitive—if not protected well.

Q. In your opinion, Doctor, if the man had been in a dug-out about four o'clock in the morning when a shell landed and killed several men in his presence and practically blew his left leg off at the time, when he had already suffered serious shrapnel wounds in his right leg and other parts of his body, and he was there until ten-thirty in the morning and finally taken back to the evacuation hospital that evening and operated on that evening and had two blood transfusions, and his leg was amputated and the stump left as you observed it, in your opinion, Doctor, would that man, having gone through what he went through—stand on that leg for any considerable length of time, if ever again? A. It would aggravate very much if he did.

Q. Could that man having gone through that, carry on a continuously gainful occupation, after having been wounded as I have described?

Mr. Curtin: I object—it is the question for the jury on the evidence and not for the witness to answer.

The Court: Well, here you have the nervous condition ———

Mr. Curtin: Still I feel it is the question that settles the issue and is the question for the jury to decide.

The Court: He may be allowed to say whether that would seriously injure his health, on account of

Dr. Ripley—direct—cross.

his nervous condition—what effect work would have on his health.

Q. What effect would work, particularly standing work, have on his health, Doctor? A. It would be very detrimental; increase his instability I should judge.

By the Court:

Q. Would it be serious? A. I think it would be chronic after a time.

Cross examination by Mr. Curtin:

Q. Have you a report of your examination, Doctor? A. A very poor one, sir.

Q. May I see it? A. (handing paper to Mr. Curtin) I don't know as you can read it.

Q. We will try to read it. A. If you can you will do better than I can.

Q. Where do your findings start, Doctor? A. My findings don't start. I haven't summarized. That is just what I have taken down.

Q. That is what you took at the time of your examination? A. Yes.

By the Court:

Q. That is history probably? A. That is just history.

Mr. Curtin:

Q. Is there anything on that report to indicate the presence of any nervous condition in Berry? A. Yes.

Q. Any finding of yours to indicate that? A. The whole picture I think would.

Q. Well, Doctor, when you give a man a mental or neuro-

Dr. Ripley—cross.

logical examination you give him certain tests, don't you? A. Yes.

Q. And you base your diagnosis on the reaction of the particular man to the particular test? A. Sure.

Q. What test did you give Berry? A. Oh, I gave him the various neurological tests. Tested his eyes, tested his knee jerks, tested his station—his locomotion—all those things which are very important.

Q. And how was his reaction to the eye test? A. Very good.

Q. Was that reaction to light, is that what you call it? A. Yes.

Q. And his reaction was very good? A. Yes.

Q. How was his knee jerk? A. His knee jerk was just fair.

Q. And did you give him the clonus test? A. The ankle-clonus?

Q. Yes? A. Yes.

Q. Give him the Babinski? A. Yes, I tried that; they were pretty fair.

Q. What particular finding in your examination did you make on which you based the diagnosis of neurosis in 1937?

A. Well, because of his instability.

Q. That is his history, isn't it? A. That is what you always have to take that into account in making a diagnosis; you must review your history.

Q. After you get your history you give these tests? A. Yes.

Q. And you use the tests in combination with the history to reach the diagnosis? A. Yes.

Q. And both are very important elements? A. Both work together.

Q. Together? A. Yes, work together.

Dr. Ripley—cross.

Q. And this man's history, unless you have certain reactions to the various tests you have given, wouldn't justify a diagnosis of neurosis, would it? A. Yes, it would.

Q. Would you make a diagnosis of neurosis on history alone? A. No.

Q. Now what was there that you found on examination, on giving these tests, in Berry, to justify the diagnosis of neurosis?

A. Why, there's nothing very tangible there only you look—in these neurological tests, for certain elements you can rule out. In the case of general paresis you get the Argyle-Robinson pupil—which you said about reacting to light; then you get your exaggerated knee jerks. You want to exclude those always in the neurotic case; always do.

Q. What did you exclude in this case? A. I excluded it all.

Q. So your findings or your tests did not bring out anything to justify a diagnosis of neurosis, did it? A. Yes, it did.

Q. Tell the Court what you found. A. I am telling you, on examination his eye tests were not bad, and his knee jerk was not bad. That isn't a neurological—that isn't a test for neurosis.

Q. My first question—when you say you gave the eye test— you said his reaction to the eye test was good? A. I did and I still maintain it.

Q. You said the knee jerks were fair? A. Fair; that's all right.

Q. You said some other test was all right? A. The Babinski and the ankle-clonus—you spoke of it.

Q. Tell us what test you gave which you got a reaction to that justified a diagnosis of neurosis? His sleeplessness, his restlessness, his inability to apply himself—all those things.

Q. That's history. A. Yes, but you have to take them into consideration. You must get every prominent physical sign in a neurosis.

Dr. Ripley—cross.

Q. If they're not very prominent, the neurosis isn't very severe? A. It is severe, yes.

Q. Wouldn't you get reaction to your examination, to those tests, if this man's neurosis was of a pronounced type? A. You might not, no. You cannot get the test of the neurosis as well as you can some other things, but you exclude it by our examination.

Q. For the sake of answering this question, assuming that the neurosis was present in 1937? A. I do.

Q. Can you state when that neurosis started? A. I cannot.

Q. And there may be any number of reasons to bring that neurosis into existence in this man over a period of years, isn't there? A. Yes.

Q. Now as I understand it, Doctor—I might be repeating here—the diagnosis you gave this man of neurosis was based entirely on history, wasn't it? A. Most all on history—sleeplessness is insomnia, and those things and other nervous ailments which you do not demonstrate by physical examination.

Q. You did not demonstrate any physical symptoms by your examinations? A. You don't have to.

Q. What do you give the tests for? A. To exclude it.

Q. Your tests were negative? A. His test was comparatively all negative.

Q. So you didn't find any reaction to justify any diagnosis of a nervous or mental condition in Berry as far as your examination was concerned, did you? A. My examination was based on everything I found during my examination.

Q. I mean your tests ——— A. The tests were all right, and you will find them all right in a neurosis lots of times—those tests you speak of.

Q. Of what degree would you say the neurosis was? A. I would say quite a severe degree.

Dr. Ripley—cross.

Q. You are still basing that on history? A. Yes, I am basing it on what I found when I examined him.

Q. A usual treatment for a neurosis is work, isn't it, Doctor, of the right kind? A. We prescribe it if they're able to perform it.

Q. I mean of the right kind? A. It's—occupation is fairly good treatment, yes, but you cannot push that.

Q. If occupation and work is good treatment for a neurosis—a nervous condition—how can you say it would be detrimental to his health to work, if you give it for treatment? A. He cannot work; by proving he cannot apply himself to anything very long.

Q. Now you are getting back to the history again, aren't you, Doctor? A. You have to take everything into consideration in making a diagnosis.

Q. You do say in the treatment of your nervous and mental cases you advise occupation of a specific type? A. Of a light type, yes.

Q. Of the type that will suit them? A. Yes.

Q. And that tends toward the curing or clearing up of the neurosis in the person affected? A. In some cases, and in others it does not.

Q. You say in this case the usual treatment would be detrimental? A. I should say this man had worked it out. He did not show improvement under occupation.

Q. You furthermore say that he has a marked neurosis? A. Yes.

Q. And you want to say in spite of that marked neurosis, the various tests you gave him were negative? A. The physical tests were negative, which I would expect to find.

Q. You never saw this man before you examined him in 1937? A. No, I never did.

Q. If he was examined in 1928 by a competent physician and found to have an amputation of the leg and recommended by

Dr. Ripley—cross.

the physician as a good insurance risk, would that have any bearing upon your opinion as to this man's ability to work, or the effect of the neurosis on him personally? A. No, not a bit.

Q. If in fact he did work, that surely would have an effect on your opinion, wouldn't it, Doctor? A. No, not—that wouldn't bias my opinion.

Q. If anything in the way of evidence turned up to show things different than what you understand them to have been since 1919—when he got out of the army—would that change your opinion? A. No.

Q. So it wouldn't make much difference what the evidence was? A. I should still have my opinion.

Q. Of course, you are basing that on facts and evidence? A. Thirty-five years experience.

Q. And the facts and evidence in a given case? A. Yes.

Q. When you are given a hypothetical question, those facts and that evidence has to be true, or the opinion you give is not proper? A. Perfectly true, yes.

Q. And if one particle of that hypothetical question turns out not to be true, it would affect your opinion, wouldn't it, Doctor? A. No, my opinion would be the same.

Q. Regardless of what the evidence showed? A. Regardless of—my examination showed me.

Q. Your opinion on the man in the past? A. I didn't know the man in the past.

Q. If given a hypothetical question and asked your opinion about this man's condition in the past, as you did in direct examination; each element of the hypothetical question had to be correct? A. Yes.

Q. Otherwise, your opinion is no good, is it, Doctor? A. No.

Q. You have got to have the truth? A. I have got to have the truth.

Dr. McSweeney—direct.

Mr. Curtin: All right.

Redirect examination by Mr. Gibson.

Q. How many diagnoses do you make in the course of a year? A. How many?

Q. Yes? A. About five to six hundred I should estimate.

Mr. Curtin: At this time I move the testimony of Dr. Ripley be stricken for the following grounds: On cross examination the Doctor stated all his opinion was based on history alone. This suit was brought in 1931 and the examination in 1937—six years after the institution of the suit, and the examination was for the purpose of testifying here and I think it is improperly allowed in Court. If the history is not admissible, certainly the examination of the Doctor based on history alone is not.

The Court: Denied.

Mr. Curtin: Exception.

DR. ROLAND E. MCSWEENEY called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Gibson.

Q. State your name, residence and occupation, please. A. Roland E. McSweeney—I am a surgeon and live in Brattleboro, Vermont.

By the Court:

Q. You are the son of Dr. McSweeney of St. Johnsbury?

A. Right, sir.

Dr. McSweeney—direct.

Q. He practiced there in St. Johnsbury a great many years. You were born there? A. Yes sir.

By Mr. Gibson:

Q. About how many cases do you operate on in the course of the year? A. Between 150 and 175 cases a year probably.

Q. How long have you been practicing Doctor? A. Since 1926.

Q. How long have you been operating? A. Since 1930.

Q. At some time did Mr. Leroy Berry come to your office for treatment? A. He did.

Q. When? A. August 29, 1938.

Q. What did you find at that time? A. He had an amputation of his left leg about six inches below the knee; the stump was very much reddened—inflamed—and had numerous blisters on it from pressure.

Q. What was your treatment for it? A. I told him to go home and soak the stump in either hot or cold epsom salts and to keep his artificial limb off until the wound—until the stump had become less irritated.

Q. Have you also observed the other scars on his body? A. I have.

Q. Now tell the jury about the nature of this amputation of the stump and the covering over it? A. Well, the covering over the stump was very inadequate; the pad either had shrunk down or the amputation had not been too successful—either from probably a lack of tissue in the gunshot wound, but there was a very small amount of muscular padding over the end of the bone, and the whole lower—the remains of the stump—the tissue had shrunk, as they often do, and become very irritated and very reddened, and the skin was—had numerous blisters on it.

Q. Whether or not in your opinion, Doctor, this man can ever stand on that leg for any continuous period of time, even

Dr. McSweeney—direct—cross.

with an artificial leg? A. He cannot stand on it any length of time without irritation.

Q. In your opinion, since the date of this amputation, could he stand on that leg without irritating it, for any length of time, even with an artificial limb? A. In my opinion he could not.

Q. That is because of the ———

Mr. Curtin: Let him tell.

Q. What is the reason? A. Because of the lack of padding over the end of the bone which is amputated, and because of a low re-section of the nerve which runs down the leg.

Q. What do you mean by that? A. I mean that in the amputation the nerve was left on and the nerve endings have to be covered with fat or muscle or skin tissue to obviate irritation, and without taking those precautions the limb that is not well padded—the nerve endings are irritated and you get neurofibroma at the end of the nerves, which are very painful, and we get a continual breaking down of the skin from the nerve irritation.

Q. What is neurofibroma? A. That is a tumor of a nerve caused by irritation.

Q. What about the nerve endings on this particular limb? A. By the look of the limb as I saw it in August I would say that the nerve endings were very irritated.

Q. Were they covered up adequately? A. No.

Cross examination by Mr. Curtin:

Q. Doctor, if these nerves were taken out, wouldn't the man be able to use his wooden leg with about as much usefulness as his own leg? A. I beg pardon?

Q. repeated by reporter. A. If the nerve was removed and padded well.

Dr. McSweeney—cross.

Q. Well, if the nerve was taken out? A. We don't take the whole nerve out. We re-sect perhaps two inches of the nerve back away from the wound.

Q. Did you notice where one of these nerves was taken out of this stump? A. I think so, yes.

Q. Couldn't that be done to the other nerve ends there and prevent this irritation? A. I happened to see the report of the operation done in the Boston Hospital for removal of a fibroma, and evidently they resected some of the sciatic nerve at that time.

Q. I think you are referring to Parker Hill around 1920 or '21? A. Yes, the one Mr. Gibson showed to me at recess.

Q. This is a type of wound you would expect where a man got hit with a piece of shrapnel, isn't it? A. It is a type of wound, yes.

Q. This talk about the end of it, and the amputation being bad and not done in the proper way, would indicate to you more the idea of how he lost his leg rather than how it was cut off by the surgeon? A. I couldn't say as to that, sir.

Q. Is it better to have a large portion of your leg remaining than it is a small portion? For instance, is there any advantage in having only part of the leg gone rather than the whole leg?

A. We save all the leg we possibly can.

Q. That is the general practice among surgeons, isn't it?

A. Yes.

By the Court:

Q. How about cutting this leg again just above the knee to get a good stub? A. That would be the thing that I would do—is to re-amputate the leg above the knee, but that entails more shock, and with the irritated stump as he has there now, it would be a much more serious thing than the first amputation would be.

Dr. McSweeney—cross.

By Mr. Curtin:

Q. When was the first time you saw Mr. Berry? A. August 29, 1938.

Q. And you never saw him before that time? A. No sir.

Q. Know nothing of the history? A. Not a thing.

Q. Is there any reason why he couldn't stand on that leg if this irritation was not present? A. No.

Q. And if a proper covering was put on it in the way of a woolen cloth or like of that and he was given a position where he did not need to stand so much, is there any reason you can find in your examination that would prevent Berry from working?

A. Yes, there was. You couldn't put on any artificial splint on this stump and let him walk down street without having the stump irritated.

Q. You found it irritated at the time you examined him in August '38? A. Very much so.

Q. You don't know the cause of that, do you? A. Yes, I think I do. He had been working in a filling station and I think he stated he had worked only one or two days and it was in very hot weather and he—it was a very painful stump when I saw him.

Q. That was in August 1938? A. Yes sir.

Q. In your examination of him did you come to a decision on how the stump was aggravated? A. How it was aggravated?

Q. Yes, was there anything apparently about his condition except the story he told you that would indicate how this had come painful? A. No.

Q. Was there anything about the artificial leg that would indicate to you the use of the leg would irritate it? A. No.

Q. In fact, the leg, Doctor, the artificial leg—the stump goes down in? A. Yes.

Q. To the bottom part? A. Yes.

Dr. McSweeney—cross.

Q. It touches nothing in that leg, does it? A. It does not touch the stump at all but his weight—the weight of the man's body is supported by a leather contrivance around here (indicating) which shuts off the circulation and irritates the nerve endings and makes the inflammation in the stump.

Q. Well, if that support around the knee was adjusted properly and got away from the tying up of the blood arteries, there's no reason he cannot operate on that? I don't see how he could operate his leg.

Q. What do you mean—do you have to have this ———

A. You have to have some support on your stump to be able to swing your leg, you see.

Q. But is it necessary to have that so tight as to stop the circulation of the blood? A. It doesn't have to be tight. It isn't tight at all. The stump goes into this socket and the weight of the leg has to be taken up somewhere, below the knee or around the knee.

Q. That pulls up the knee—this support—rather than letting the weight go down into the stump? A. Yes, it takes the weight off the stump.

Q. When he swings that leg doesn't he loosen up that support and allow the blood to go through? A. It isn't the question of blood going through. It is a question of irritation of nerve endings.

Q. I understand you to say there was a tightening up around the knee which shut off the flow of blood? A. I don't recall having said anything about that.

Q. I may have misunderstood you. The condition you found there in August, is there any reason why he couldn't carry on at a job sitting down? A. Unless you can keep him off his stump all the time ———

Q. It wouldn't be necessary to keep him off all the time,

Mr. Healey—direct.

would it? A. Frankly, I don't see how the man can walk around the courtroom without causing irritation of that stump.

Q. If it isn't irritated now ——— A. I don't know—I haven't seen it.

Q. ——— it is apparent the walking doesn't irritate it?

A. I don't know—I haven't seen him walk.

Mr. Curtin: That is all.

ALEXANDER HEALEY called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Barber:

Q. Tell us your full name. A. Alexander Healey.

Q. Where do you live? A. St. Johnsbury.

Q. How long have you lived there? A. Thirty-five years.

Q. Did you at one time work in the Corner Garage in St. Johnsbury? A. Yes sir.

Q. What was the nature of your duties there? A. Foreman of the repair shop.

Q. Did Mr. Berry work there at one time? A. Yes sir.

Q. Was he working under you? A. Yes sir.

Q. Tell us what kind of work Mr. Berry was doing when working for you? A. Well, practically all of his work was generator and starter.

Q. Whether or not that is the type of work can be done sitting at the bench? A. Yes, most of it could.

Q. Was Mr. Berry engaged in vocational training then or was he a regular man? A. I think he was in vocational training.

Mr. Healey—direct.

By the Court:

Q. Well, how did he operate? A. He would take his leg off and put it on the bench where he worked and if he had to get around he would go on crutches most of the time. He would use the leg some but not much of the time. I used to give him—a lot of his work was taking up bearings, where he could lay on the creeper and wouldn't be on his feet, under the car.

Q. Go on. A. That's about all there is to it.

Q. Tell us about his inability or ability to work? A. I used to have quite a lot of trouble about being able to keep him there. Mr. Wright wanted to let him go, ——

Mr. Curtin: I object.

The Court: That's well enough.

By Mr. Barber:

A. (continued) —— and I kind of took pity on him and tried to have Mr. Wright let him stay.

Q. How long did he stay? A. Well, it was just during that summer—I don't know just what date he got through—but somewhere in the fall.

Q. What was the trouble that Mr. Wright wanted to let him go? A. Because he lost so much time.

Q. How much time did he lose on an average? A. It's pretty hard to say. I should judge half time.

Q. Who kept the time reports of the help there? A. Well, the time reports were kept in the office. I checked them up and turned in the help's time each day. Each morning they were turned in to the office.

Q. You worked in the garage business how long? A. About twelve years.

Mr. Healey—direct—cross.

Q. From your experience what do you say as to the advisability of having a man such as Mr. Berry was, work for you in the garage? Whether or not you can use a man on the light jobs such as this?

Mr. Curtin: I object to the question. It isn't a question if he can.

Mr. Barber: It's a question whether anybody can use him.

The Court: Would he be better than the jury on that?

Mr. Barber: I guess we can let that go.

Cross examination by Mr. Curtin:

Q. Mr. Healey, at the time you worked at the Corner Garage with Berry, he was in vocational training? A. I understand he was, yes sir.

Q. He was paid by the Government to go there and learn to be a mechanic? A. I believe so, yes.

Q. The Garage also gave him something each week? A. I couldn't say. That is something out of my line.

Q. Now what's the name of the owner of the Garage?

The Court: William Wright.

Q. Didn't William Wright have to report—do you know whether he had to report? A. I suppose he did; that's out of my hands.

Q. Do you recall anybody coming around getting a check on whether he was there or not? A. No, that would be all done in the office—in the front part.

Q. You know he was sent there by the Government? A. Yes, I was told that.

Mr. Drown—direct.

Q. How long was he working there? A. Well, it was in the early spring—I cannot say what date.

Q. What year? A. Well, either '21 or '22. I was put in foreman in '20 and it was after that.

Q. The Garage was training him to be an auto mechanic, wasn't it? A. Yes.

Q. They were teaching him all the various duties of an auto mechanic? A. That they could, yes.

Q. He worked on all types of jobs while there at the Corner Garage? A. Yes sir.

LLOYD E. DROWN called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Barber:

Q. Tell us your full name. A. Lloyd Earl Drown.

Q. Where do you live? A. St. Johnsbury.

Q. Did you live in St. Johnsbury in the year of 1920? A. No, I lived in Lyndonville.

Q. What were you doing then? A. I was working for my father in the garage.

Q. Did Mr. Berry work in the same garage with you? A. Yes, Mr. Berry did.

Q. Did you work with him? A. I did.

Q. Tell us about Mr. Berry's work—what you observed there? A. He come there under the vocational training part of it—they sent him there—the Government—to learn the trade; and he worked there with us—which he didn't work more than half the time on account of his leg—and when he did work he had to have light jobs, something he could set to the bench or he could get propped up on the fender somewhere where he could grind

Mr. Drown—direct—cross.

valves. He couldn't walk and travel and carry heavy stuff and work on all kinds of work. You had to pick out something he could do at the bench or on the side of the car where he could sit down. He couldn't get under the car and take a transmission out, where he had to wiggle around and put his feet up and push around, and jack up a car—things like that—heavy cars—he couldn't do that.

Q. Did he use crutches at all? A. Yes.

Q. Much or little? A. Quite a little. He would be to the bench and that leg bothered and he had to take it off, and he would take his crutches and go from one place to another.

Q. Have you seen the stump at these times when on crutches? A. Absolutely.

Q. Tell us what it looked like? A. I have been in there and in the morning there would be white festers on there—he would have to prick it to get the water out of them, and it would be all irritated. Lots of times he couldn't come to work before nine o'clock. We would have to go and get him and by noon he would say "I am licked—I can't stay and tend to it".

Mr. Curtin: I object to that as hearsay.

The Court: Isn't that part of the res gestae?

Mr. Curtin: We always differ on that.

Q. How much of the time did Mr. Berry work there on an average?

The Court: He told you less than half.

Cross examination by Mr. Curtin:

Q. Mr. Drown, your father operated this garage? A. Yes sir.

Q. Is he living? A. Yes sir.

Mr. Nadeau—direct.

Q. He would know whether Berry worked and how much he got paid? A. Absolutely.

Q. Where does he live? A. Up to East Lyndon.

Mr. Curtin: He will be here tomorrow. I think we are having the father. They got the son and we have the father.

Q. How long did he work for your father? A. He come there early spring and got through in the fall, if I remember right.

Q. Was he a good mechanic? A. Absolutely; what work he done was A-number 1.

Q. Isn't it a fact the reason he got through was because of some argument with the head mechanic? A. I couldn't say for that.

Q. Wasn't there a fellow named Smith head mechanic? A. Yes.

Q. Do you recall any argument that Berry had with him? A. No, not that I know of. I supposed to this day they were good friends.

Q. I don't mean serious argument. After he got through at your father's, didn't he go to work for Nadeau? A. I couldn't say. I think he went back to St. Johnsbury. His family was in St. Johnsbury if I remember right.

JOSEPH E. NADEAU called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Gibson:

Q. Tell us your name. A. Joseph Eugene Nadeau.

Q. Where do you live? A. Lyndonville.

Q. How long have you lived there? A. Oh, off and on for the last fifteen years.

Mr. Nadeau—direct—cross.

Q. Did you at one time operate a garage there? A. I did.

Q. Did Mr. Berry work for you? A. He did.

Q. Tell us about the kind of work he did for you? A. Well, he came to work for me in, I think it was along the last of May, 1928, and I didn't know Mr. Berry until that time. I had seen him but I didn't know him personally, and I put him on whatever come along but I soon found out he couldn't do any heavy work, and lots of times he come to work on his crutches. When he did come with his leg he often took it off and laid it up on the bench and worked around. I gave him all the light work I could and sometimes we would have to go get him in the morning, and sometimes we would take him back.

Q. How much of the time did he work on the average?

A. He didn't average to work more than half the time, not while he was with me.

By the Court:

Q. ~~Would that be spasmodically—off and on?~~ A. Yes, sometimes he would come in at noon and work probably three or four hours and then again he would come in the morning and work until noon and then have to go home.

Q. Did there come a time he got through? A. I let him go in November.

Q. Did you have any reason for letting him go? A. Yes, quite a few. In the first place I had four other men and they began kicking because I was favoring him too much, more or less, and I let him go I think in November; that fall any way.

Cross examination by Mr. Curtin:

Q. Mr. Nadeau, he did the work assigned to him? A. Yes, he did—that is, the light work. I started in giving him all kinds of work.

Mr. Sinnott—cross.

Q. He was an auto mechanic? A. Yes.

Q. Was he a good or bad one? A. He was a good mechanic; what he could do he done very well.

Q. How much did you pay him a week? A. Well, let's see—I think at that time I was paying—I think I was paying my men \$30.00 a week.

Q. How long did he work at your garage? A. I kept him from along in May until in November.

Q. Then the business runs down in the winter? A. It didn't that winter; when the heavy overhauling began to come in he had to get into the hard work like the rest of them.

Q. You had Workmen's Compensation in your garage? A. At that time, yes sir.

Q. Of course, you had to have certain requirements for employees before you could get Workmen's Compensation? A. Yes sir.

Q. Didn't Berry get hurt while working for you—didn't a big jack hit him? A. If I remember right, I think he did.

Q. The fact is he got laid off for some weeks there due to this accident? A. No, he was laid off, I think ———

Q. Due to this accident? A. Yes, I think that accident laid him up three or four days. The jack handle let go and struck him in the jaw.

Q. You never had any trouble with the Workmen's Compensation Insurance over Berry working for you? A. No sir.

WILLIAM SINNOTT called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Gibson:

Q. State your name, please. A. William Sinnott.

Q. You live where? A. Hardwick.

Mr. Sinnott—direct—cross.

Q. Your occupation is what? A. I work in the stone shed.

Q. Do you know Leroy Berry? A. Yes, sir.

Q. When did you first know him? A. In Hardwick.

Q. About what time? A. I should judge about six years ago.

Q. Did he live near you for some time? A. For four years.

The Court: Now tell about his leg.

Q. Have you observed him walking around and whether or not on crutches, or how? A. I have seen him on crutches.

Q. And what else have you observed? A. I have seen him on crutches today and perhaps tomorrow I might not see the man for a week. I don't know whether he was off visiting or abed; then you would see him on crutches again.

Cross examination by Mr. Curtin:

Q. Did you know him about six years ago? A. I never did until he became neighbor of mine.

Q. Did you ever see him drive an automobile? A. I have seen him drive an automobile, yes sir.

Q. How many times have you seen him with crutches? A. I couldn't tell you.

Q. Well, when did he move away from Hardwick? A. I don't know.

Q. Did you know any place where he worked—ever observe him working? A. Well, I have seen him working drawing stone with the truck.

Q. Hauling stone? A. Granite, yes sir.

Q. He used to operate a trucking business, didn't he? A. Yes sir.

Dr. Kinney—direct.

Q. How often did you see him driving a truck? A. Not a great while; perhaps a couple months. He wasn't always the driver though.

Q. Was there anything else you saw him do while you knew him? A. No sir.

Q. What is your occupation? A. Sandblast man—carving and lettering.

Q. Where do you work? A. Woodbury Granite Company.

Q. You are working every day I presume? A. Yes sir.

Q. And were during this period that Berry was in Hardwick? A. Well, I wouldn't say that I worked all the time because I don't have steady work.

Mr. Curtin: That is all.

(Recess from 4:30 p.m. until 9:30 tomorrow morning.)

(Tuesday, May 16, 1939, 9:30 A.M.)

DR. ALBERT KINNEY called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Gibson:

Q. What is your first name, Doctor? A. Albert Kinney.

Q. You live where, Doctor? A. Hardwick.

Q. What is your profession? A. I am a general practitioner.

Q. A general practitioner of what? A. Of medicine.

Q. How long have you been practicing medicine? A. 27 years.

Q. And a graduate of what medical school? A. University of Vermont.

Dr. Kinney—direct.

Q. During the World War where were you, in the armed forces of the United States? A. I was.

Q. In what capacity? A. As a Reserve Medical Officer to start and afterwards they were taken into the Regular Army Medical Corps.

Q. Did you serve in a medical capacity in France? A. I did.

Mr. Curtin: What difference does this make?

Mr. Gibson: Showing his experience.

Q. You may state what experience you had in France in that line? A. Well I was on detached service with the British Army; I was permanently attached to the 15th Field Ambulance in the Royal Army Medical Corps.

Q. Did you serve at First Aid Stations on the front lines? A. Yes sir.

Q. For how long a period of time? A. Well, from July 5, 1918 until after the Armistice—until the Armistice.

Q. About how many cases would you say went through with gunshot wounds? A. Hundreds—probably thousands, but I couldn't say.

Q. How long have you been practicing in Hardwick, Doctor? A. Nineteen years—since the war.

Q. In 1933 did Mr. Leroy Berry come to see you for treatment? A. Yes.

Q. You tell the jury what you found about his leg or about his condition? A. Well, he called me for an abscess on the stump of his amputated leg.

Q. Describe to the jury what you found there. A. I found a badly swollen irritated stump with an abscess the size of a hen's egg—gathering—just below the knee on the internal aspect of the stump.

Dr. Kinney—direct.

Q. Did you treat him that summer? A. I did.

Q. And for what? A. These abscesses—I treated him for two I believe.

Q. For two abscesses? A. I think so.

Q. And during that time was he able to be on his amputated leg at all? A. Why not during the time he had the abscesses he couldn't wear his artificial limb.

Q. Did you give a careful examination to the amputation that was done on this leg? A. Yes sir.

Q. What about that—tell the jury about that? A. Well, he has a very poor stump; evidently was not a classical amputation.

Q. Is that the kind of stump that often appeared in your experience from gunshot wounds? A. Yes sir.

Q. And in your experience is this man able to stand for any length of time, continuously, on that leg or on any artificial leg supporting it? A. I don't think he can.

Q. Do you think he ever could have since he left the Service? A. No.

Q. Did you make a report to the Veterans Bureau about this? A. I did.

Q. Have you the report of August 1933, of Dr. Kinney?

Mr. Curtin: I will look. (Hands report to Mr. Gibson.)

Mr. Gibson: Thank you.

Mr. Curtin: When we have records, we give them to you. When there isn't any records, of course, we don't have them.

Mr. Gibson: Well, I don't know as I would want to go that far.

Q. I show you Doctor Pltfs. 1-B ———

Dr. Kinney—direct.

Mr. Curtin: I haven't any objection to that being admitted.

Mr. Gibson: You haven't?

Mr. Curtin: No.

Mr. Gibson: I am surprised!

Q. (continued) ——— is that your signature? A. It is.

Q. Is that the report you made on August 10th, 1933 to the Veterans Bureau? A. Yes.

Mr. Gibson: I offer it.

Mr. Curtin: No objection.

The Court: Admitted (Pltfs. Ex. 1-B). (Pltfs. Ex. 1-B read by Mr. Gibson.)

Q. Doctor, did you observe in your various examinations of Mr. Berry other wounds or marks on his body? A. Yes sir.

Q. Describe those to the jury if you please. A. He has quite a large inverted scar over the right hip joint and another one on the inner aspect of the upper right thigh.

Q. For how long a period of time may I ask was Mr. Berry under your care? A. Why, periodically from early in the summer of 1933 until—for about a year. I should think.

Q. And at other times until he left Hardwick ——— A. Until he left Hardwick.

Q. That is, you were his regular doctor there at Hardwick? A. Yes sir.

Q. And saw him at different occasions? A. Yes sir.

Mr. Curtin: Let the witness tell.

Q. On other occasions what have you observed about his use of his leg—this amputated leg—during the time that he was

Dr. Kinney—direct.

in Hardwick? A. Well, I have seen it at other times when it was very much irritated and blisters on the stump.

Q. That is, you treated him for blisters at other times? A. Yes.

Q. That was at different times than these abscesses? A. Yes.

Q. Whether or not you have observed him on crutches at times? A. Yes.

Q. How often? A. Quite frequently.

Q. Has he got the full use of his right leg, Doctor? A. No, I wouldn't say so.

Mr. Curtin: Is that the amputated one?

Mr. Gibson: No.

Q. Why not? Tell the jury about that. A. Well, he has this large shrapnel wound just over the hip joint—lost a lot of muscular tissue—filled in with hard scar tissue.

Q. What effect does that scar tissue have on his right leg? A. Well, it's bound to weaken it and very likely to be painful.

Q. During your observations in France, what do you say as to whether or not a man who is struck by shrapnel suffers a shock? A. A very severe shock.

Mr. Curtin: I don't believe the doctor is able to answer that.

Q. Is that a nervous shock? A. Yes sir.

Mr. Curtin: I object.

The Court: What's the trouble with it?

Mr. Curtin: There's no question but what the answer is to be "yes", "a nervous shock"—putting the answer right in the witness' mouth.

Dr. Kinney—direct—cross.

Mr. Gibson: I am going to ask how severe?

Mr. Curtin: How does this witness know how severe any shock is?

The Court: I don't know. He can say so if he doesn't know.

Mr. Gibson: This man testified he served in front lines for a considerable length of time and treated thousands of gunshot wounds.

Mr. Curtin: Go ahead.

Q. What do you say as to the severity of the nervous shock of a wound such as was received by Mr. Berry? A. I think it would be a severe nerve shock,—surgical shock.

Q. How long would that last? A. It might last for varying periods depending a good deal on the man's general condition.

Mr. Gibson: I think that is all.

Cross examination by Mr. Curtin:

Q. Well, Doctor, in August of 1933 you examined this man? A. Yes sir.

Q. Did you find any nervous condition on that examination? A. Why, this man was nervous; he was suffering severe pain in this abscess at that time.

Q. All right, Doctor, read from that report you sent to the United States Government, anything on it that indicates that this man was suffering from a nervous disability in 1933? A. No, there's nothing on that that would indicate it.

Q. Of course, you were examining him for the purpose of finding out how disabled he was? A. I was treating an abscess on the stump of his leg and from the repeat abscesses he got I was suspicious he had a bone involvement. I thought he should be hospitalized and have ———

Dr. Kinney—cross.

Q. On account of the abscess? A. On account of the abscess, yes sir.

Q. And if there was present on your examination a severe nervous shock, as you testified to, you would have reported that to the United States Government, wouldn't you, Doctor? A. Not necessarily.

Q. You want to tell this Judge and jury that when you examined him in August of '33 and found a severe nervous condition, that you wouldn't report it to the Veterans Bureau? A. If that was ———

Q. Answer the question, Doctor.

Mr. Gibson: I submit he is trying to.

A. I was treating the man's leg. I was not treating his nervous condition.

Q. So if one of your patients come to you with a cut in the leg and they have another disability much more severe than the cut in the leg, you wouldn't bother with it? You would just treat the cut in the leg, is that what you want to tell this jury?

A. No.

Q. Now, Doctor, the severity of the nervous shock would depend entirely on the personal makeup of the man who suffered the nervous shock, wouldn't it? A. Why, not entirely. Of course ———

Q. Don't different people react differently to certain situations such as—you take Berry here, he had his leg shot off—his reaction to that following the leg amputation might be entirely different from any other individual, isn't that true? A. It might be different, yes.

Q. And you would have to know the physical makeup—personal makeup of the individual who suffered the injury, before you would be able to tell what the nervous reaction was—isn't that

Dr. Kinney—cross.

so, Doctor? A. I wouldn't say so. I don't know just how you are distinguishing between nervous shock and surgical shock. It's possible for a person of various disposition to die from surgical shock.

Q. You have had a good deal of experience over across in the operations, that is true, Doctor? A. Yes.

Q. And each patient that you treated had a different reaction from the next patient, that is true? A. Oh yes.

Q. And Berry may be just that type of individual that would not show the nervous reaction to the injury such as he suffered, as compared with some other individual, isn't that true? A. He might be, yes.

Q. In any event in August of 1933 you never noted any nervous condition after the examination of him? A. Why no, not in that connection.

Q. Of course, Doctor, you were treating him as his personal physician? A. Yes.

Q. And you had in mind to treat him and care for him so he would be able to live and enjoy life? A. Yes.

Q. You also had in mind, Doctor, that he was a beneficiary of the Veterans Bureau—you wrote to the Veterans Bureau? A. Yes.

Q. And you knew at that time that any condition you found would increase the compensation payments that were coming to Berry as a result of his injuries in the Service? A. No, I didn't know that. I didn't know anything about his compensation. He might have been getting the limit then for anything I know. I did think he needed attention and needed to be in a hospital where he could get a thorough examination and get treatment that he needed.

Q. When you made that report to the Veterans Bureau you only spoke about the abscess, Doctor? A. Well, that was the thing that I was treating at the time and was particularly in-

Dr. Kinney—cross—redirect.

terested in. I did know that the man could get called in for examination and he would get a thorough going over.

Q. The first time you treated this man was in July of 1933, that is true, Doctor? A. I couldn't say as to the month.

Q. The first year you treated him? A. Yes.

Q. Was in 1933? A. Yes.

Q. You never saw him before that time? A. Why, I had seen him but I didn't know him until early in the spring of 1933.

Q. You never saw him for the purpose of treating him? A. No.

Q. Whatever his disability was before that date, you have no personal knowledge of? A. No.

Q. You don't know to what extent they were? A. No.

Q. Is there any reason why this man couldn't work, if he had a job where he didn't use his feet much, or foot much, and where there wasn't much standing up? A. As far as my personal knowledge of it is concerned, no.

Q. He could work at a job where he sat down? A. Where he sat down.

Mr. Curtin: That is all.

Redirect examination by Mr. Gibson:

Mr. Gibson: Do you claim there's no nervous involvement in this case, Mr. Curtin?

Mr. Curtin: Well there wasn't the last time we tried it and I don't think there is now.

Mr. Gibson: Then will you produce the doctor's report made by one of your doctors on Sept. 27, 1930, and Dr. Drouin's? I would like all these reports—Dr. Goldstein's report of July 2, 1919, and Dr. Child's of April 2, 1923, Oct. 15, 1923 and March 11, 1924, and Dr. Wheeler, March 13, 1924, ———.

Dr. Kinney—redirect.

Mr. Curtin: How do you know the dates of them?

Mr. Gibson: Well I am asking you for them.

Mr. Curtin: Because you have seen them before.

Mr. Gibson: And Dr. Maynard of Aug. 16, 1930.

No, I haven't seen them—and Dr. Bock of December 5, 1933.

Mr. Curtin: You don't want the jury to understand you never saw these doctors' examination reports before, do you?

Mr. Gibson: I most certainly do. As far as I am concerned I never saw them.

Mr. Curtin: You went all over the examination reports the last time.

Mr. Gibson: Well I wasn't there.

Mr. Curtin: That was Mr. Barber—that's right.

Mr. Gibson: You see sometime you make a mistake.

Mr. Curtin: Sometimes? I make a lot of them. I have no objection to them (produces reports).

Q. Doctor, what is neuresthenia? A. Well, it is a nervous disorder.

Q. That is a nervous disorder. What is shell shock? A. Well that is also a nervous disorder.

Mr. Gibson: Well, you have no objection to this?

Mr. Curtin: No.

Mr. Gibson: I will offer this.

The Court: Admitted. (Pltfs. Ex. 1-C).

Mr. Curtin: I have no objection to any of those examinations.

Mr. Gibson: This is an examination of October 1930 by a Government doctor (reading from Pltfs.

Dr. Kinney—redirect.

Ex. 1-C) * * * * *. That is about his nervous condition in 1930.

Mr. Curtin: May I see that report? Just so we will know what exhibit is referred to I am reading from Pltfs. Ex. 1-C, that Mr. Gibson just got through with. Dr. Tierney in answer to a question—In your opinion is it advisable that claimant resume his former occupation? answered "yes."

Mr. Gibson: This is an examination made in 1924 by Doctors Wheeler, Child and Dr. George Hall. (Pltfs. Ex. 1-D read in part by Mr. Gibson.)

Q. What is neuroma, Doctor? A. It is a tumor of the nerve trunk.

Mr. Gibson: * * * * *

Q. Prognosis means what, Doctor? A. It means the outlook and prospects.

Q. When you say a prognosis is guarded, what do you mean by that? A. Uncertain.

Mr. Curtin: I object.

The Court: That is all right enough.

Mr. Curtin: I don't know whether this Doctor would have the same idea of what guarded meant as the doctor who made the examination.

The Court: The question was what that means.

Mr. Curtin: He is reading from the examination paper. The man who knows what that means is the doctor who made the examination.

Mr. Barber: It is a general medical term.

Mr. Curtin: It doesn't make any difference whether you object or not.

Dr. Kinney—redirect—recross.

Mr. Gibson: The next question "Is claimant able to resume his prewar occupation in your opinion? In part only." * * * *

Mr. Curtin: May I see that? (Mr. Gibson hands paper to Mr. Curtin.)

Mr. Gibson: I don't see that any of these were in evidence in that last case; no marks on them.

Mr. Curtin: You saw them all, so it's your fault.

Mr. Barber: We won't go into that.

Mr. Gibson: Reading from Pltfs. Ex. 1-E, 4 pp.

* * * * * This is dated 12-5-32. * * * * * Doctors Maynard, Upton and Bock.

Perhaps by looking them over at this recess we can expedite things a little. I think that is all with the Doctor.

Recross examination by Mr. Curtin:

Q. Doctor, just what is neuresthenia? A. If they say "neu-res-then-Ī'-a" it's ten dollars; if they say "neu-res-thēēn'-ē-a" it's only five.

Q. Will you tell us just what neuresthenia is? A. That's a rather hard question, sir.

Q. Let me put the question this way: Is there any organic or actual condition existing in the way of physical disability in a case of neuresthenia? A. No, it's an unstable nervous condition.

Q. And one who suffers from neuresthenia suffers from a condition of the mind and not a condition of the body? A. That's the idea, yes sir.

Q. And if one has a disability with a physical basis and you find there is a mental or nervous condition in him, there's not neuresthenia, is there? A. Yes, you might develop neuresthenia

Dr. Kinney—recross—redirect.

from a physical condition. A person gets an injury and they develop all sorts of imaginary symptoms.

Q. Isn't a neuresthenic condition a case where they think they're suffering from something and actually they're not suffering from a physical disability? A. That's the idea but the condition of nueresthenea may be caused from the physical injury.

Q. And, of course, Doctor, you would have to know the degree of the neuresthenia before you would be able to say just how much they're affected in their everyday life? A. Yes.

Q. And there's various degrees of nervous condition—neuresthenia, psychoneurosis, and like of that? A. Yes.

Q. And if one has a slight case of neuresthenia, there's no reason why they couldn't carry on work? A. No.

Q. In fact, practically all of us have a certain degree of neuresthenia? A. Very many of us, yes.

Q. And unless you are able to say definitely the degree, you wouldn't be able to tell how that person was affected in working or carrying on in everyday life? A. No.

Redirect examination by Mr. Gibson:

Q. Doctor, is there such a thing as traumatic neuresthenia?

Mr. Curtin: I object.

The Court: I will allow it.

A. Yes sir.

Q. And tell the jury ———

Mr. Curtin: You didn't think he was going to say "no" when you asked him, did you—traumatic neuresthenia?

Q. Tell the jury what it is. A. As I said a minute ago neuresthenia may—may have an organic basis. A person may

Dr. Kinney—redirect—recross.

get an injury and the shock of the injury sets up all sorts of ideas.

Q. That is, an injury such as a shell wound or shrapnel wound ———

Mr. Curtin: I object to that.

Q. (continued) ——— might that cause neuresthenia?

Mr. Curtin: I object. All day yesterday and he started in today, and he's practically testifying for the witness.

The Court: Well, wasn't it you remarked yesterday you were not going to try to stop him, and I said I had tried for forty years, starting with John Redmond ———

Mr. Curtin: It's rather peculiar, Judge, that you always remember my admissions but you never remember my objections.

The Court: I hadn't thought of that. All right (general laughter).

The Court: I should think the question would be better to apply it to this patient.

Mr. Gibson: All right, I will reframe it.

Q. If Mr. Berry received a shrapnel wound in his left leg and right leg and right arm and head and shoulder, might that be the cause of neuresthenia? A. It might.

Q. And in your judgment would it cause neuresthenia?

A. It would be very likely to.

Recross examination by Mr. Curtin:

Q. Well, Doctor, what is a trauma? A. Trauma?

Q. Yes? A. Injury.

Dr. Kinney—recross.

Q. When Mr. Gibson asked you ——— traumatic neures-
thenia and traumatic neurosis is the same thing, aren't they,
Doctor? A. Practically—it's difference in degree.

Q. And when Mr. Gibson asked you about traumatic
neurasthenia you understood him to mean a neuresthenic condi-
tion due to the trauma or injury? A. Yes sir.

Q. Is there such a thing as traumatic neuresthenia? A. Is
there such a thing?

Q. Yes? A. I think so.

Q. You *think* so? A. Yes sir.

Q. Do you know whether there is? A. Yes.

Q. And is traumatic neuresthenia recognized as a disease
by the medical profession? A. Yes.

Q. Did you ever before make a diagnosis of traumatic
neuresthenia on any occasion? A. Yes.

Q. How many cases of traumatic neuresthenia have you
had? A. Oh, I couldn't tell you.

Q. Did you make a diagnosis of traumatic neuresthenia?

A. Could I?

Q. Did you in each case? A. Yes.

Q. You definitely made a diagnosis of traumatic neures-
thenia? A. I don't know whether I understand. You mean
every case I ever treated that had neurasthenia whether I ———

Q. No, you said you had a great many cases of traumatic
neuresthenia? A. Yes.

Q. Now I ask you if in each case did you make a definite
diagnosis of traumatic neuresthenia? A. Oh, probably not.

Q. Now trauma of itself means that the person was in-
jured, doesn't it? A. Yes.

Q. Neuresthenia means the nervous disability, isn't that so?

A. You might have a nervous injury without any physical injury.

Q. But trauma and neuresthenia are quite different—you
get the neuresthenia on the neryous side and the trauma on the

Dr. Kinney—recross.

physical side?" A. Well, you get trauma of the nerves without any physical injury many times.

Q. I am showing you Pltfs. Ex. 1-B, read to the Judge and jury anything in that examination indicating a traumatic neuresthenia? A. Oh no, there's nothing in it.

Q. No. Of course, when a man comes to you for examination and you examine him, you give him all the findings, don't you? A. Oh no; not necessarily. If you came to me for a boil on your wrist, I might not give you a mental examination.

Q. You probably should. A. I am not qualified.

Q. You mean to say this man went to you in August of 1933 and you examined him and you didn't put down there all your findings? A. Well, I put down the thing that was uppermost in my mind at the time and his principal complaint at that time.

Q. You examined him, didn't you? A. I didn't give him any mental examination, or nerve examination.

Q. You examined him? A. Yes, I examined the sore on the stub.

Q. You made no report of any traumatic neuresthenia or neurosis on that occasion? A. No.

Q. In fact it was not present, was it? A. I couldn't say as to that.

Q. You had him before you? A. Yes.

Q. And you gave him a physical examination? A. I gave him a physical examination.

Q. And noticed his reactions, isn't that so? A. Yes.

Q. And if he had any great degree of neuresthenia present at that time you would have been able to diagnose it, wouldn't you? A. Not necessarily.

Q. In any event you didn't note it on your report to the United States Government of August 1933? A. No sir.

Q. And as far as that report is concerned, there's no mental

Mr. Berry—direct.

or nervous condition existing in Berry when you examined him in 1933? A. That is as far as I went, yes.

Redirect examination by Mr. Gibson:

Q. As a matter of fact, this Exhibit 1-B—that was a letter written by you to the Veterans Bureau?

Mr. Curtin: I object. This is his exhibit. He put it in as his evidence.

Q. Were you in 1933 in any way connected with the Veterans Bureau? A. No sir.

Mr. Curtin: What difference does it make?

Recross examination by Mr. Curtin:

Q. After treating Mr. Berry you wrote this letter to the Veterans Bureau, is that correct? A. Yes sir.

Mr. Curtin: That is all.

LEROY A. BERRY, the plaintiff, recalled.

Direct examination by Mr. Gibson: (continued)

Q. Will you tell the jury what personal doctors you went to in St. Johnsbury other than Dr. Tierney? A. Dr. McSweeney that used to be in St. Johnsbury, and Dr. Atwood.

Q. Dr. McSweeney, where is he now? A. He's dead.

Q. What kind of Doctor is Dr. Atwood? A. He's an osteopath.

Q. While you were in Lyndonville did you go to a doctor? A. I had Dr. Davis of Lyndonville, and I had Dr. Herrick of West Burke.

Q. Where is Dr. Davis now? A. Dr. Davis is dead.

Mr. Berry—direct—cross.

Q. Where is Dr. Herrick? A. I don't know where he is. He left Lyndonville and went I believe to Cambridge. The last I heard he had left Cambridge and gone somewhere else.

Q. While in Wheelock or Sheffield on this farm for four years did you go to a doctor? A. I had Dr. Jones of Sheffield and I had Dr. Herrick of West Burke there.

Q. How old is Dr. Jones now? A. Well, to the best of my knowledge he's somewhere around eighty-five.

Q. At sometime did you have Dr. Libbey? A. I had Dr. Libbey while I was working at Mr. Morrill's Garage in Danville, and for gas trouble—I was partially overcome by gas there.

Q. Where is he? A. He died I believe this last winter.

Q. While in Hardwick did the Veterans Bureau also send you to another doctor in Hardwick? A. Yes, they sent me to Dr. Ferris in Hardwick.

Q. Where is he? A. He died within the last year or so. I believe he was present at the last trial.

Q. Was this Dr. McSweeney of St. Johnsbury an uncle of this Dr. McSweeney?

The Court: He was the father.

A. Father of this doctor who was here yesterday.

Cross examination by Mr. Curtin:

Q. This Dr. Davis you are talking about, is he from Sheffield, Vermont? A. No sir, from Lyndonville.

Q. He's dead now? A. Yes sir.

Q. Now you got out of Service in March was it, 1919?

A. January.

Q. And you went down to the Veterans Bureau and you have been examined by them and treated by them ever since, haven't you? A. At times, yes; there has been times that I haven't been to them very often.

Mr. Berry—cross.

Q. And when you went to them you went to them with the purpose of getting treatment? A. No, for examination.

Q. For examination? A. Mostly.

Q. And when you went to them you knew whatever you told them in the way of complaints had a great deal to do with the amount of money you would get in compensation? A. Certainly.

Q. Of course, you told them the entire situation? A. Yes.

Q. How many hospitals have you been in Leroy since you got out of Service, up to the present time? You have been in Parker Hill? A. I was in Parker Hill in 1920, and in 1928 I was in the hospital in St. Johnsbury for an appendix operation, and I think that is all the hospitals that I have been in.

Q. Only two times and one of those was when you were operated on for appendicitis? A. Yes.

Q. When you got out of Service you knew about your insurance, didn't you? A. Yes sir.

Q. You knew the conditions of your insurance? A. I thought I did but it appeared I didn't.

Q. Did you or didn't you, Mr. Berry? A. I beg your pardon?

Q. Did you or didn't you know the conditions? A. I thought I knew it but I didn't, no.

Q. Well, in May of 1919 you wrote to the Government and told them to cut down the amount of your insurance, didn't you? A. Yes; yes, that's true.

Q. How much were you paying in premiums a month to the Government? A. As I remember it was \$7.08 or \$6.07—I cannot remember.

Q. If the record shows it was \$6.60 you would say that was

Mr. Berry—cross.

what you paid? A. If the records show that, that is probably what it was.

Q. That was for ten thousand dollars? A. Yes.

Q. Ever since you got out of Service, Mr. Berry, you have been paid compensation, haven't you? A. Yes.

Q. How much were you being paid when you were first discharged? A. When I was first discharged I was paid \$100.00 a month on the basis of temporary total disability.

Q. And at the present time how much money are you being paid? A. At the present time I expect it is a basis of \$135.40.

Mr. Gibson: I don't want to object to this, if the Court please, but this has nothing to do with the case. We have nothing to hide here. He does get compensation of \$80.00 a month as I understand—80% total disability.

The Court: I says one hundred thirty ———

Mr. Curtin: If Your Honor please, Mr. Gibson brought out this man dropped his Government insurance when discharged because he didn't have any money to pay for it. I have the right to show he had an income from which he could easily have paid \$6.60 a month to keep the ten thousand dollars in force.

Mr. Gibson: I just want the facts straight. As I understand it now ———

Mr. Curtin: I will put it in.

Mr. Gibson: I understand it's \$80. a month now and so much per child.

A. (continued) If you would like that, I think I can give it to you from time to time—what it has been all the time since I was discharged—about as soon as the records can.

Mr. Berry—cross.

Q. In any event, Mr. Berry, in 1919 when you were discharged, you were paid \$100.00 a month compensation? A. I didn't get it for several months.

Q. You were paid that? A. When I got it I got a check for \$529. as I remember it.

The Court:

Q. That related back ——— A. That brought it back to the time I was discharged, yes.

By Mr. Curtin:

Q. When were you married? A. During that time I didn't have much money.

Q. repeated. A. In April of 1919.

Q. Now you were injured at the Toul Sector? A. Yes sir.

Q. That was before the St. Mihiel and Argonne Forest push, wasn't it? A. Yes, I didn't know anything about St. Mihiel or the Argonne Forest.

Q. After you were injured there you went into the hospital? A. Yes.

Q. And were treated at the army hospitals in France and in the United States? A. Yes.

Q. And you told them just what was bothering you at that time? A. Yes.

Q. And then you were discharged in January 1919, did I understand you to say? A. January 2nd I think.

Q. Of 1919? A. Yes.

Q. Your leg was all healed up at that time? A. It was healed except a little spot that discharged periodically.

Q. That eventually cleaned up, didn't it? A. It's cleaned up now although it's had spells of breaking open and discharging since.

Mr. Berry—cross.

Q. When we tried this case in Rutland the last time, your leg was all right then, wasn't it? A. It wasn't all right, no.

Q. There were no blisters? A. There was a place that wasn't quite healed; it was still a little scab left on.

Q. There's none left on there now? A. I think I can show you one today—a pimple that came up yesterday and is partially broke, and a little scab on it there today. It isn't—that's only one today where there's several times there's dozens of them—of the same thing.

Q. In any event you didn't have that yesterday, did you? A. It started yesterday.

Q. Well getting back to the war service, you came out of service and you applied for vocational training? A. About six months—probably four or five or six months after.

Q. You asked the Government to send you to a school of photography, didn't you? A. No, they asked me to go. They told me I would have to—have to take up some trade to try to get myself a living instead of living on the pension.

Q. In any event you did go to the School of Photography? A. I did go, yes.

Q. You were a photographer before you went in the army?

A. I had taken part of the course—I had started to take a course previously.

Q. After you got out of the army you still had an interest in photography? A. I was still interested and still am, if I could do it.

Q. You still want to tell the jury they made you take the course in photography, or do you want them to understand you were interested? A. I was interested in photography and that was the only thing that they would give me vocational training in, and that I got the vocational training to provide for myself; naturally I wanted it.

Mr. Berry—cross.

Q. How much did they pay you when you went to vocational training? A. Either eighty or eighty-five dollars a month—I cannot give you exact.

Q. Isn't it a fact they gave you one hundred a month? A. Not during the vocational training, no. While in New York I got eighty or eighty-five dollars a month.

Q. When in New York—just before you went to the School of Photography in Michigan? A. In Illinois.

Q. And what school did you go to in New York? A. The New York Institute of Photography.

Q. And the Government bought you books and paid tuition? A. They bought books while I was in the Illinois College of Photography.

Q. That was sort of a post graduate course? A. Yes, they bought all my supplies necessary for the course.

Q. You went to Illinois and took a sort of post graduate course in photography? A. Yes.

Q. You got your diploma? A. I didn't get a diploma.

Q. You were graduated? A. I finished the course.

Q. Then you came back to Vermont and the Government found you a job, didn't they? A. They recommended I take a job in Boston.

Q. I show you this paper headed Federal Board for Vocational Training, Boston, Mass. and ask you if that is your signature. A. Yes sir.

Q. And sometime in December of 1919 you wrote to the Federal Board of Vocational Education: "State character of occupation? None. Remarks: Having completed my course in photography, I now desire a position, either permanent or in placement training; if you can secure the same for me I will be greatly obliged. Leroy A. Berry." So in December of 1919

Mr. Berry—cross.

you felt you could work, didn't you? A. I felt I wanted to try it.

Q. And as a result of that didn't the Federal Government get you a job in photography at Marceau's Studio, 160a Tremont St., Boston? A. Not in photography. Retouching—which isn't photography.

Q. Did you get a letter of which this (indicating) is a copy from the Veterans Bureau? A. I did.

Q. That letter says: "This is to inform you we have located employment for you in photography at Marceau's Studio, 106a Tremont St., Boston providing if you feel capable of successfully doing retouching. Mr. Thoreau of this Studio says he will give you a tryout at this work for perhaps a half day or so and if you are able to successfully perform the work, he will give you \$25.00 a week to start, and says that if you have the ability, you will be able in a short time to receive forty to fifty dollars per week"?

A. Yes.

Q. Now in answer to that letter didn't you send this letter to the Government—is that your signature (indicating)? Read it if you want to. A. Yes, I sent that letter.

Q. And you told the Government official you received transportation to Boston for the purpose of employment but you found you couldn't accept the position and you sent back the transportation? A. I couldn't because I tried the position. I went to the studio and tried the position.

Q. Did you go to Boston? A. I went to Boston on another set of transportation. I had two set. I went to Boston and reported at the office and told them I couldn't do retouching and that I hadn't been able to do it in school, and they wanted me to go out there and try it and see if I couldn't do it in this studio—the conditions would be different and wanted I should try them. I went to the studio and stayed in there approximately an hour and a half and tried it.

Mr. Berry—cross.

Q. Did you work in Marceau's? A. I did approximately an hour and a half, yes.

Q. You got this letter on January 12, 1920 and then on January 23, 1920 you wrote them and said you were returning the transportation request as you couldn't go to Boston —

A. Not that I couldn't go to Boston.

Q. Didn't you say that in your letter? A. I had been to Boston and been out and tried it.

Q. Anyhow on January 23, 1920 in answer to the letter from the Federal Government about taking this job in the studio in Boston, you wrote to them and said you had received your transportation to Boston for the purpose of employment but that you found you could not accept the position? A. I found that couldn't.

Q. And that you returned the transportation? A. I found that I couldn't accept it after I tried it because I couldn't retouch.

Q. You didn't say that in the letter? A. Not in the letter because they already knew. I reported back to the office I couldn't and sent back this extra transportation that I had.

Q. Well, the Government sent you through the School of Photography, paid your expenses and sent you to Illinois—gave you a post graduate course there, and brought you back to Vermont, and during that time paid you eighty to a hundred dollars a month, and when you got back here you said you wouldn't accept the job in Marceau's Studio in Boston—for whatever reason you may have had—and then you applied to the Government a second time and requested you be sent to Vocational Training to be an auto mechanic? A. I didn't apply for that.

Q. Well, you got it, didn't you? A. They came to St. Johnsbury and opened an office there and notified all the disabled men in that district to appear at the State Armory in St. Johnsbury.

Mr. Berry—cross.

Q. You went down to the State Armory? A. I went down to the State Armory.

Q. And as a result of that visit you enrolled as a ———

A. They wanted to know—they asked me why I couldn't carry on with the photography and I told them.

Q. You elected to take a special course in automobile mechanics? A. They asked me what else I would like to take up—if there was any other branch I would like to take up, and I figured that I might make something of mechanical work. I always liked mechanical work and figured I might make something at it.

Q. In any event you went to vocational training as an automobile mechanic? A. I did.

Q. And you were in vocational training as an automobile mechanic from 1919 to 1923?

The Court: Three years.

Q. Four—three or four years, whatever it is? A. From 19—sometime in 1920 I believe.

Q. 1920 was it? A. Until early spring of 1923.

Q. And during that time you worked in these various garages?

The Court: Yes.

Q. And the Government paid you how much a month during that period? A. The Government?

Q. Yes? A. From one hundred and twenty-five to one hundred forty dollars I think.

Q. Now the first place you went to to take up vocational training was what garage? A. At Lyndon—Lyndon Auto Sales Co. I think.

Mr. Berry—cross.

Q. How much did they pay you on top of what the Government paid you? A. A part of the time he paid me \$10.00 a week for what time I worked; not \$10.00 every week but ten dollars—on the basis of ten dollars a week for what time I worked.

By the Court:

Q. \$10.00 a week if you worked a full week? A. If I worked a week, yes.

By Mr. Curtin:

Q. What was the next garage? A. Morrill's Garage in Danville.

Q. How much did he pay you? A. As I remember \$15.00 a week for the full week.

Q. This was on top of the 125 or 50 the Government paid you? A. Not 150—I never got 150.

Q. Pardon me. A. 125 to 40.

Q. Where was the next garage? A. The Corner Garage at St. Johnsbury.

Q. How much did they pay you? A. They paid me \$15.00 a week for about two months during the summer, and then nothing at all during the winter, and the next summer resumed the \$15.00 per week during the busy months.

Q. You have always driven an automobile, haven't you, Mr. Berry? A. Not always; there has been times I couldn't. I have had a license since 1920.

Q. You have had a license since 1920? A. Yes.

Q. And you were a public driver at times, too, weren't you? A. Not to any great extent, no.

Q. You got a license to be a driver for hire in the State of Vermont? A. No.

Q. Aren't there two kinds of licenses in the State of Ver-

Mr. Berry—cross.

mont? A. No, there used to be an Operator's and Chauffeur's license.

Q. You had what was known as a Professional Driver's license? A. I had a Chauffeur's license, the first one I got I guess.

Q. If these records show you were in the New York Institute of Photography from May 14, 1919 to September of 1919, and then again from September 1919 to November of 1919—that you were auto mechanic at Thorsen's Garage—is there such a garage? A. What were those dates?

Q. Practically from May to November 15, 1919? A. That I was at Thorsen's Garage?

Q. No, that you were in photography? A. Yes.

Q. Then from November 15 of 1920 to December of 1920 you were in Thorsen's Garage? A. I was about a week or ten days—I don't remember exactly.

Q. From February 2 to May 2, 1921 at Lyndon Auto Sales Co.? A. Yes.

Q. And then from May 2 to July 12, 1921 you were at Morrill's Garage? A. Yes.

Q. From July 12, 1921 to October 31, 1922 you were at the Corner Garage. If the record shows from October 31, 1922 to April 15, 1923 you were at the St. Johnsbury Garage, you say that those dates are true? A. To the best of my knowledge, I think that's approximately the dates I gave you yesterday in direct testimony.

Q. During the time you were in vocational training you had what they called a Counselor check up on you? A. Yes.

Q. He came to the Garage or wherever you were taking vocational training? A. Yes.

Q. And he talked to the man at the Garage, and did he talk to you? A. Yes.

Mr. Berry—cross.

Q. Now at Drown's Garage in Lyndonville, when you got through there you got through on account of an argument with the foreman, didn't you? A. Yes, I did.

Q. It had nothing to do with your ability to work, did it?

A. No, not that I know of.

Mr. Curtin: I wish at this time to offer the records in the Government file of the vocational training as an auto mechanic of Mr. Berry.

The Court: Admitted. (Gov't. Ex. H Vocational Training record of 28 pp.)

Q. In 1923, Mr. Berry, you completed your course in automobile mechanics? A. Yes.

Q. Ever since you completed it up until the present time your employment has been dealing in and the repair of automobiles, particularly? A. Yes.

Q. Where did you work in 1925? A. I had a garage in partnership with R. L. Walker in Sheffield.

Q. Outside of a couple years which you spent running a farm, you have always been in the garage business or engaged as an automobile mechanic in somebody else's garage? A. No.

Q. What other work did you do? A. Well, there was four years I was—four years and a half I had this farm, and there was about six months out of that four and a half years that I was in the garage, during 1925, that I actually kept the garage open and carried it on—about six or seven months, and I didn't work at the garage business any more until 1928 when I went to work for J. E. Nadeau in 1928—worked for him what I could for the summer, or May until November, something like that, and about two months after that I went in business for myself after I got through with Nadeau.

Q. During this time in vocational training and working at

Mr. Berry—cross.

these garages, you were under the care of the Veterans Bureau?

A. When I needed any care, yes.

Q. You were examined at various times since 1919 by the Doctors? A. Yes.

Q. And you told them your complaints during that period when you consulted them? A. Yes.

Q. Sometime in 1919 you applied to the Connecticut General Life Insurance Co. for insurance of a thousand dollars, didn't you? A. I wouldn't say in 1919.

Q. Well, if it appears in 1919 or 1920 you did apply, would you say that was true? A. I think it appears in 1923 if you get the records right.

Q. We will say 1923 then. You applied for a thousand dollar policy in the Connecticut General Life Insurance Co.?

A. Yes sir.

Q. And you were examined at that time? A. Yes.

Q. You were recommended for the insurance? A. I suppose I was; I got it.

Q. You got it? A. Yes.

Q. How long did you keep that insurance in force? A. Approximately two years, or two and a half.

Q. Then in 1928, Mr. Berry, you applied to the Metropolitan Life Insurance Co. for a policy in the amount of two thousand dollars? A. No—that was sort of a flexible policy; a thousand dollars I believe in case of ordinary death, and two thousand dollars in case of accidental death, or something to that effect.

Q. Was there any provision in there for permanent and total disability? A. No, not to my knowledge there wasn't. Not that I remember of.

Q. Mr. Berry, I will show you this paper headed "Application to the Metropolitan Life Insurance Co." and ask you if

Mr. Berry—cross.

that is your signature appearing on the inside first page? A. It is.

Q. And I ask you if it is your signature appearing on the page headed "Continuation of Application"? A. It is.

Q. And I ask you if it is your signature appearing on the back page—on the page headed "Medical Examination, not to be filled out by agent"? A. It is.

Q. Mr. Berry, this is dated September 7, 1928, is that right?

A. That's right.

Q. And on that date you said that you had resided in Sheffield for four years? A. Post Office address was Sheffield. The place I lived was just across the town line in Wheelock.

Q. "Place of birth was St. Johnsbury, Vt.; date of birth April 4, 1895; you were married; occupation auto mechanic repair shop; exact duties of occupation repairing cars; any change in occupation contemplated? If "yes" give particulars." You answered "No". "Place of business Lyndonville, Vt., J. E. Nadeau; former occupation farming and same. Do you within the next twelve months contemplate going outside the United States or Canada, or making an ocean trip? A. No. Have you any intention of making aerial flights, etc.? No. Have you any other application or negotiation for life, accident or health insurance now pending or contemplated? No. Have you applied to any other Company or Association without receiving insurance in the amount of the plan applied for? No. Beneficiary Fatima A. Berry, wife". Then you go over here—"Continuation of the Application" which says your height was 5 ft. 6½ in." —

The Court: Is that material?

Mr. Curtin: Yes, it is now—statement of good health.

The Court: I would skip those if I were you. It

Mr. Berry—cross.

is admitted. (Gov't Ex. G—application to Metropolitan Life Ins. Co.)

Mr. Curtin: (reading Gov't Ex. G) * * * * *

Q. Present condition of health * * * * *—you said good, didn't you? A. Yes.

The Court: It's self evident; he has answered and he signed it.

(Recess of ten minutes.)

Q. Well, Mr. Berry, as you went on answering these questions you stated in answer to question 8—"have you ever changed your residence or left your work for more than one month on account of your health? If yes, give date, duration and name of ailment" and you answered "No"—that's true? A. For one month—I don't think I had for more than a month at a time.

Q. "Any physical or mental deformity or infirmity—if yes—give particulars." You said "No". "Any impairment of sight or hearing? No. Have you had any surgical operation, serious illness or accident? If yes, give date and relation of the ailment. Operated for appendicitis April of 1928." That is your statement? A. That is, anything outside of what he could see, yes. I think there is a notation made in there of the amputation, and those other things.

Q. That's true. Then in answer to question 20—"How much time have you lost from work through illness during the last five years?" and you said "A few weeks, as above", and above you stated you were treated for appendicitis and underwent an operation. That is your statement in 1928, wasn't it? A. I don't remember as to that. That is what was written down.

By the Court:

Q. Are those answers in your hand? A. No.

Mr. Berry—cross.

Q. The signature is in your handwriting? A. Yes.

By Mr. Curtin:

Q. Was that true in 1928 when you made that statement?

A. Well, the only part that ever made any difference to the Life Insurance Co. was true I expect.

Q. When you stated in 1928 ——— A. What his question was, as I remember it—was due to my health—my bodily health—was whether I had lost time? That is as I remember the thing, and I answered the question asked.

Q. Mr. Berry, in answer to question 8—the question was “Have you ever changed your residence or left your work for more than one month on account of your health?” and you answered “No”? A. Right.

Q. Was that true in 1928? A. That’s true in 1928 as far as I know; when I had no work to leave ———

Q. Well, did you understand this question as I read it to you—have you ever changed your residence or left your work for more than one month on account of your health? That did not refer just exactly to 1928, did it, Mr. Berry? A. Well, in the spring or summer of 1920 I didn’t work all summer, but I didn’t leave any work because I had no work to leave at that time. I was unable to work and I didn’t have any job to leave, and I didn’t change my residence because I stayed right there in St. Johnsbury —continued living there.

Q. In answer to question 18—have you been attended by a physician during the last five years? If yes, give the name of complaints, dates, how long sick and names of the physician. You answered “Yes, for appendicitis”? A. That was the main thing, yes.

Q. That was true in 1928, that in five years previous to that the only time you were sick was when you had appendicitis?

Mr. Berry—cross.

A. I wouldn't say that was the only time. That was the main thing I was attended by a physician.

Q. That is what you stated in 1928, wasn't it, Mr. Berry?

A. It doesn't say that is the only doctor I ever had in that period of time, does it?

Q. That is what it says, Mr. Berry; was that true? A. Not as I understood it and not as I would understand it now.

Q. In answer to question 19—have you had any treatment within the last five years at any dispensary, hospital or sanitarium? If yes, give the date, duration and name of ailment and name of institution. You said "yes, as above" referring to your appendicitis operation. That's true, wasn't it? A. Yes.

Q. You were examined for insurance, weren't you, Mr. Berry? A. Yes.

Q. And examined by Dr. F. H. Davis of Lyndonville, Vt.? A. Yes.

Q. And was that the Davis that was your personal physician? A. He was the family physician most of the time while we lived in Lyndonville and some while we lived in Sheffield.

Q. He knew your condition? A. Yes.

Q. And was personally acquainted with you? A. He was personally acquainted with me and a friend of mine.

Q. The fact of the matter is he recommended you for this insurance after examination? A. He did because I wanted the insurance.

Q. When you stated to the Metropolitan Life Insurance Co. in 1928 that you had no ailment that interfered with your work, that you had not been sick to such degree you had to leave your employment or move, you were telling the truth in 1928, weren't you? A. That I hadn't had anything that interfered with my work?

Q. That you had no ailments that made you leave your

Mr. Berry—cross.

employment? A. I don't think there's anything in that statement says that.

Q. "Have you ever changed your residence or left your work for more than one month?" A. More than one month, yes.

Q. "On account of your health"? A. That's true; one month is thirty days; that is quite a few days at one time.

Q. It's true then from the time you got out of the army up until you signed that application, you had never been sick to such degree you had to stay out of work for the period of a month? A. That I had to leave my work when I had any work. I think I told you yesterday I was out of work for over three months—nearly four months—in 1920 on account of the Parker Hill Hospital operation.

Q. When you stated in this application then ——— A. I didn't have any work at that time.

Q. Did you understand that application referred to ———
A. I didn't have a job.

Q. Did you understand that application referred only to the time when you made the application in 1928? A. Did I understand it did?

Q. Yes? A. I understood that referred to the time I had work—that I had to stay out from work on account of it.

Q. You understood the application and the questions in there asked about, which you signed, had to do with your past health and the condition of the same? A. Yes.

Q. And you knew they were basing their judgment in granting insurance to you, on statements you made in there? A. I did not consider that amputation and the trouble with that stump had anything to do with my bodily health which concerned the Insurance Company.

Q. The fact of the matter is, Mr. Berry, the amputation or

Mr. Berry—cross.

loss of that leg was the only thing that bothered you in 1919 up to 1928, isn't it? That's true? A. No.

Q. Did you say anything in there about suffering from a nervous condition? A. I didn't say anything about it, no; they didn't ask me anything about it.

Q. Didn't they ask you if you had any sickness or illness and you said only for appendicitis in 1928? A. That is serious illness.

Q. You didn't consider your nervous condition serious? A. Serious enough so it bothered me, but still the nervous part of it I didn't consider kept me from trying to work.

Q. I will show you this paper headed "National Union Indemnity Co., Pittsburgh, Pa., Application for Fidelity Bond" and ask you if that is your signature appearing thereon? A. It is.

Mr. Curtin: I offer this.

The Court: Admitted. (Gov't Ex. F.)

Q. Now you went to work at one time for the Aluminum Cooking Utensil Company? A. Yes.

Q. One of the conditions of going to work there was that you file a Fidelity Bond? A. Yes sir.

Q. And in making your application to the National Union Indemnity Co. you had to state your past history as far as work was concerned—that is true, Mr. Berry? A. I think the representative of the Aluminum Cooking Utensil Co. made that out and I signed it as a matter of form to get the bond.

Q. Well, you signed? A. Yes.

Q. And on that statement you said that from February of 1920 to November of 1922 you were a mechanic at St. Johnsbury and worked for W. A. Wright at the Corner Garage of St. Johnsbury, Vt., and from November of 1922 to January of 1924 you worked for L. C. Benoit of St. Johnsbury, and from January of

Mr. Berry—cross.

1924 to May of 1928 you were the proprietor of a Garage at Sheffield, Vt. known as Berry's Garage, and from May of 1928 to January of 1929 you were a mechanic working for J. E. Nadeau at Lyndonville, Vt., and from January of 1929 to January of 1930 you again ran a garage at Lyndonville known as the South End Garage, and from January of 1930 to February of 1930 you worked as a salesman for the Airways, Incorporated of Manchester, New Hampshire ——— A. The most of those dates are absolutely wrong.

Q. Will you say now, you made that statement on February 14, 1930, that they were not true? A. Those dates are wrong.

Q. You signed your name on that paper?

The Court: Yes, he says so.

A. I signed my name but that isn't a sworn statement as I understand it. It was written out by the Supervisor of the Cooking Utensil Company and he said "Here, you sign that and we will send that in for the bond". I don't remember that I even read it over.

Q. You draw a distinction between a statement that you swear to and a statement you made? A. Not ordinarily, no. This was just roughly speaking—approximately—nothing that really mattered materially and it was made out in a hurry.

Q. Mr. Berry, in 1930 you applied to the National Union Indemnity Company for a bond so you could go to work for these people selling cooking utensils? A. Right.

Q. You gave a history of your employment. Will you now say in 1930, when you made this statement, that it was untrue?

A. The dates are wrong.

Q. They're untrue then? A. The dates aren't true. They might have been my recollection at that time—some of them.

Q. You signed that statement, Mr. Berry? A. I did.

Mr. Berry—cross.

Q. Those dates were on there? A. Sure.

Q. What did you make an untruthful statement to the National Indemnity Co. in 1930 for? A. I wasn't aware that I did.

Q. Well, was it true in 1930 you worked that time, or was it true what you said yesterday and today? Which is the truth?

A. I told the truth absolutely yesterday and today—every word.

Q. In 1928 when you applied to the Metropolitan Insurance Co. and in 1930 when you applied to the National Indemnity Co. you were telling an untruth, is that true?

Mr. Gibson: I object. I don't think he told any untruth in this statement as far as I can make out—in this Metropolitan policy.

Mr. Barber: The record speaks for itself, Your Honor.

Mr. Curtin: The question is proper.

A. Not an untruth, as I understood it, no.

Q. Getting down and talking as you and I understand things, when you applied for that insurance in 1928 to the Metropolitan Life Insurance Co., you knew they were interested in the condition of your health? A. Yes, in my bodily health.

Q. And you knew if you were permanently and totally disabled the Metropolitan Life Insurance Co. wasn't going to issue you a policy? A. That was understood to start with—that the account of the wounds was taken into consideration. It wasn't a policy of disability or anything of that sort. It was straight life insurance policy and they told me if my heart, lungs and hearing and eyes, etc., were normal, that that was all that was necessary. That was understood at the time of it.

Q. In fact in 1928 when you were examined and applied for the insurance, the only disability you told them of was your

Mr. Berry—cross.

amputated leg? A. It might be the only one they made notation of but that wasn't the only one I told them of.

Q. When you signed the application did you tell them anything about your nervous condition you are testifying to today?

A. I told them I was bothered about being nervous. Yes, I told Dr. Davis I was bothered with being nervous.

Q. Do you find that on the application? A. No, I don't find that on the application; it isn't there.

Q. This paper is what they issued the policy on, isn't it?

A. Yes.

Q. In fact, in 1928 the only disability you had was your amputated leg, isn't that so? A. No, it isn't.

Q. When was the first time that you ever complained of a nervous condition to anybody connected with the Government?

A. I don't remember the first time but I have complained about it off and on ever since I was discharged from the Service.

Q. All right, I show you this form entitled Application of Person Disabled in and Discharged from Service and ask you if that is your signature? A. That is my signature, yes.

Q. Now that is your application to the Government upon which you were granted your compensation payments from the time you got out of Service up to the present time, isn't it? A. I don't understand that part of it. I didn't get the date on it but look at the ——— I didn't read over any of the questions or answers or anything like that.

Mr. Curtin: I will offer it and then you can look at it. (Marked Gov't. E for Ie.)

The Court: Admitted. (Def. Ex. E.)

Q. Now on January 6, 1919 which appears to be the date on which this was signed, you made an application to the United States Government, which is Def. Ex. E, and I will ask you to

Mr. Berry—cross.

examine that paper and examine particularly Question 11: Nature and extent of disability claimed. What did you say on that date, Mr. Berry? A. I cannot say this is what I said. This is a type-written sheet.

Q. What does it say? A. It says "amputated left leg".

Q. Anything about nervous condition? A. It does not.

Q. Your signature is on that application? A. My signature, yes.

Q. That is when you applied to the Government or appealed to the Government for compensation for your war disabilities, wasn't it? A. No sir, my disability rating was made at the time I was discharged in Camp Devens.

Q. What was that rating? A. 65 per cent permanent partial, and 100 per cent temporary total at the time I was discharged. The compensation was to be rated according to that.

Q. That is an application for compensation, isn't it, Mr. Berry, as you understand it? A. Well, I didn't see anywhere it was yet. It's long ago so I don't remember.

Q. You understand when you go to the Veterans Bureau, Mr. Berry, and they give you disability, the degree of disability and the amount of disability you have has an effect on the amount of money the Government pays you, that is true, isn't it? A. Yes.

Q. Of course, when you applied as you did in January of 1919 for compensation, if you were suffering from a nervous condition along with the amputation and you made claim for it, you would get more compensation? A. They told me the nervous condition didn't have anything to do with it at that time; that the nervousness I would get over that in a few months—it was so soon after the wound, and they always refused until the last four or five months to make any account of the hip and thigh trouble at all. That never has been entered into any of my compensation

Mr. Berry—cross.

applications because they refused to make any account of it; said it didn't amount to anything and wasn't necessary.

Q. I show you Plaintiff's Ex. 3 and point particularly to a paper therein headed "Report of physical examination of enlisted man prior to separation from service in the United States Army" and I ask you if that is your signature appearing thereon, Mr. Berry? A. It appears to be a copy of my signature, yes.

Q. Is there any question about it? A. No, I expect it is.

Q. Now that is when you got out of service, wasn't it or right about that time? A. Let me see the date on here.

Q. December 30, 1918. A. That's before I was discharged from the Service.

Q. That is a statement made in the Army to the Army officials, isn't it, Mr. Berry? A. For the purpose of discharge, yes.

Q. What did you say your disability was on that date? Read the paper. A. What did I say it was?

Q. Yes? A. I don't remember as I said it. This was the result of the examination and they asked me to sign a form.

Q. What does the paper say on which your signature appears? A. Amputation of the left leg seven inches below knee as a result of high explosive shell.

Q. Any statement in there about a nervous condition? A. No.

Q. Any other complaints in there over your signature? A. No, they wouldn't write them down if I spoke of them—that was immaterial—the amputation was all that was necessary.

Q. So in December of 1918 you signed a statement to the Army officials and the only complaint you had at that time was the amputation of the leg? A. Not the only complaint I had but the only one they made notation of.

Q. The only one that appeared on the paper? A. The only one that appeared on the paper, yes.

Mr. Berry—cross.

Q. In January of 1919 you made an application to the United States Government for compensation which is Def. Ex. E and on the application the only complaint appearing thereon was amputation of the leg? A. That's right.

Q. And in either instance was any statement appearing relative to any other physical or mental condition? A. No notation made of it, no.

Q. When was it you owned a farm, Mr. Berry? A. From the spring of 1924 until the fall of 1928.

Q. How big a farm was it? A. As I remember, 96 acres or something like that; ———

Q. How many cows? A. (continued) Wood land and everything—it wasn't all farm.

Q. repeated by reporter. A. I had from two to seven or eight; eight in fact at one time.

Q. Did you have any other animals on the farm there? A. I had two horses part of the time; part of the time I didn't have any and part of the time I had three.

Q. You sold your cream to whom? A. Sold the most of it to the Lyndonville Creamery and some to the East Hardwick Creamery.

Q. How long did you operate that farm? A. We lived there four years and approximately a half, but we were not operating the farm all the time.

Q. How long a time was it you operated this trucking business. A. You refer to 1935 and '6?

Q. Whatever year it was, Mr. Berry? A. In Hardwick I had a truck about two years but I didn't operate the business only a short time in 1936.

Q. You hauled granite and you drew lumber? A. The truck did.

Q. You operated the truck? A. No, not wholly; a very little.

Mr. Berry—cross.

Q. You have had a license to operate an automobile since 19 what? A. 1920.

Q. Each year you renewed your license, that is true? A. Yes.

Q. And you have owned a car during this period? A. Yes.

Q. Do you drive every day? A. No, not every day.

Q. Did you go home last night? A. No, I didn't go home. I went out of town but I didn't go home.

Q. Did you drive? A. Not all the way.

Q. Who went with you? A. My brother-in-law, Mr. Hartwel—he's in the room—he drove more than half the way home.

Q. Did you ever do any carpentry work? A. A little.

Q. Did you ever work for Adelarde Giboriente? A. Yes.

Q. You recall that name? A. Yes sir.

Q. Did you do any carpentry work for him? A. I did.

Q. When was that, Mr. Berry? A. That was—well, starting sometime in September—the latter part of September of 1933 until December—sometime in December of 1933.

Q. Did that include plastering? A. No, there was no plastering done; it was all wallboard was put on.

Q. You do plastering, too? A. No, never did any plastering anywhere.

Q. Did you sell any cream or milk to the Fesdeisen Farm in Methuen, Mass.? A. Yes, I sold a little milk for a short period of time.

Q. What year was that? A. I cannot tell you; sometime between 1924 and 1928.

Q. Now, Mr. Berry, you went to the Photography School and graduated from the School in Illinois as a qualified photographer; then you went to vocational training as an auto mechanic and you were rehabilitated in 1923 as an auto mechanic; then you

Mr. Berry—cross.

went to work for the Corner Garage in Lyndonville in 1923; where was the first place you went to work? A. I worked for Woodbury & Benoit in St. Johnsbury where I finished my training.

Q. You went to work for them? A. Yes.

Q. How long did you work for them? A. Up until the latter part of October I should say.

Q. What year? A. That same year, 1923.

Q. 1923? A. Yes.

Q. Then where did you go to work?

The Court: Haven't we been over this several times?

Mr. Curtin: There's a couple more jobs that he had that I would like to fit in.

A. I worked for a few days ———

Q. How long was it that you worked as an auto mechanic?

The Court: Have you the names of the other places?

Mr. Curtin: Yes.

The Court: Ask him. Give him the names.

Q. Was the Lyndon Auto Sales Co. your trainee? A. Yes.

Q. Morrill's Garage in Danville, trainee? A. Yes.

Q. Corner Garage? A. Was trainee.

Q. Woodbury & Benoit's was trainee until April 15, and then you went with them after you got through training? A. Yes.

Q. Then you worked either for yourself or somebody else as an auto mechanic until what year? A. When I got through

Mr. Berry—cross.

for them I only worked for—did a little for myself at home about three months after I got through for Woodbury & Benoit.

Q. When was the last job you held as an auto mechanic—what year? A. The last job?

Q. Yes, where you worked for somebody? A. For any steady job—anything more than to work for one or two days, the last one was for Gene Nadeau at Lyndonville in 1928.

Q. After you got through working for Nadeau what did you do? A. I didn't do anything for about two months and then I started in for myself in the garage with John Bishop in Lyndonville.

Q. How long were you tied up in that concern? A. Until the following December; from about the first of February until sometime in December.

Q. What year, 1929? A. 1929.

Q. Then where did you go? A. Then two or three weeks I tried selling vacuum cleaners—Airway vacuum cleaners.

Q. After you got through there what did you do? That was still 1929? A. That was in the spring of 1930—January.

Q. Then where did you go or what did you do? A. I started with the Aluminum Cooking Utensil Company.

Q. How long did you stay with the Aluminum Cooking Utensil Co.? A. I had the contract for a year.

Q. Did you work for them for a year? A. No, not all the time.

Q. When you got through with the Aluminum Company what did you do? A. I sold Spot Remover and sold flavoring extracts and tried to sell a lot that I didn't sell.

Q. You travelled through Vermont—Vermont was your territory? A. Not the whole of Vermont, no.

Q. The northern part? A. I just went out and travelled around near my home, wherever I happened to be—wherever I could.

Mr. Berry—cross.

Q. You went out and tried to sell this stuff? A. Yes.

Q. That was in the year 1930 or '31, which? A. 1931 after I got through with the Cooking Utensil Co.

Q. Then what did you do in the line of work? A. I worked for the Motor Tool Specialty Co., selling tools to garages, for about six weeks.

Q. That is the Snap On ——— A. The Snap On Blue Point Tools, yes.

Q. How long did you stay with them? A. I stayed until they come and got their sample case, which I think was about six weeks.

Q. That was in 1931? A. Yes.

Q. Then what did you do in the line of work? A. Well, it was that period of time that I sold some flavoring extracts and things of that sort, and I sold cottage cheese and butter for the period of a few weeks or few months—two or three months for the Cabot Creamery in Cabot.

Q. In 1930 and '31 you took over the duties of a salesman for two or three different organizations, didn't you? A. Yes, I tried three or four different organizations.

Q. You went out on the road and went from door to door endeavoring to sell them? A. It wasn't much door to door—the snap-on tools wasn't, nor the cottage cheese business wasn't because that was to stores.

Q. Then you run a filling station, didn't you? A. Not at that time.

Q. How soon was it after 1931 that you operated the filling station? A. I operated the filling station for six months; leased it for six months in the summer of 1937.

Q. What did you do between the time you got through as a salesman until you ran the filling station? A. Part of the time I didn't do much of anything. I had a little place, two acres of land or something like that, on what they call the west end of

Mr. Berry—cross.

Hardwick—a little place I bought and tried to fix up and live in, and had a few acres of land, and kept one cow part of the time, and part of the time I had a few hens and raised a pig and garden between us.

Q. You bought the house in Hardwick? A. Yes.

Q. What did you pay for it? A. \$125.00.

Q. Still got it? A. No.

Q. You sold that when you moved to Brattleboro? A. I sold that over a year before I moved to Brattleboro. I should make a correction there—I paid \$125. for the shell of the house and we had to put in the interior.

Q. After you bought the house you made a lot of improvements. A. I made quite a few, yes.

Q. You put in windows? A. Windows.

Q. Doors? A. Yes.

Q. Build a chimney on it? A. No, the chimney was already there.

Q. But you did all that work yourself? A. Not all of it, no.

Q. Who else helped you? A. Well, George Gilman helped me to fix up the basement wall, and Joseph Gilman helped me, and a neighbor, Howard Jenney, came in and helped me a few days. There was several different ones; my wife and children helped me.

Q. From 1919 up until the present time you received various amounts of compensation from the United States Government?

The Court: He's told us about that.

Mr. Curtin: I don't think I was specific about it. I want to get it so I can offer it in evidence.

The Court: He told us what he got when he first came out, and it went up to \$130.

A. It went down for several years, to \$44.00, until 1931.

Mr. Berry—cross—redirect.

Mr. Curtin: At this time I offer statement from the Veterans Bureau which is a certified copy of the compensation payments to Leroy Berry up to and including Feb. 25, 1935, in the amount of \$16,825.66.

The Court: Does that show what the various amounts were from time to time?

Mr. Curtin: Yes, Your Honor.

The Court: That may be admitted. (Gov't. Ex. A-3.)

Q. How much are you getting in compensation now, Mr. Berry, per month? A. Until the first of May \$140.00. One child has become of age during the month of May, so that cuts it down to \$135.40 I suppose.

Q. How long have you been getting \$140.00? A. Since two years ago last February; February of 1937.

Q. This record shows the payments up until Feb. 26, 1937. You have been getting \$140, since 1937? A. Yes.

Q. And been getting that each and every month? A. Yes, the whole family of us have.

Redirect examination by Mr. Gibson:

Q. Just before the last trial they boosted your compensation, isn't that right? A. Yes, in 1937.

Q. Now I want to ask you when you got out of the Service and were discharged—Mr. Curtin asked you about what you told the doctors,—showing you your record; did you then have some conversation with them about your war risk insurance? A. I did.

Q. Tell us about it. A. Well; they made the rating the way that they did and I asked if I wasn't entitled to the insurance. I had understood that I was, with the loss of the leg, or loss of an arm or eye or anything of that sort, when I took the insurance

Mr. Berry—redirect.

out. I was told I was entitled to a part of it for partial disability of that sort, or the whole of it in case of the loss of two arms, or two legs, or one of each, or anything of that sort. I asked them about that and they said "No, that I was not entitled to it unless I was bedridden and helpless and had to have an attendant."

Mr. Curtin: I object to any further conversation; purely hearsay, Your Honor.

Mr. Gibson: It shows the demand this man made at the time of discharge for his insurance.

The Court: Why not show this suit was not begun until about three years ago?

Mr. Gibson: Claim was made in 1931—eight years ago this month the claim was made; that is, formal claim, but I want to show at the time of discharge he made demand.

Q. At that time also did you have a talk with your discharging doctors about your general physical condition? A. Yes.

Q. Tell us about that.

Mr. Curtin: I object to this.

Mr. Gibson: He has put in his record there.

The Court: You put in what they put down.

Mr. Curtin: I did not. That is Pltfs. Ex. 1. I don't see how the plaintiff can put in evidence like he has put in in the A. G. O. record and now show by oral testimony any change. He has got to rely on his own evidence.

The Court: Allowed.

Mr. Curtin: I object to it on the ground it's hearsay and improper. Exception.

Mr. Berry—redirect.

Q. repeated by reporter. A. I complained of the trouble in my hip and complained at that time of being nervous and not being able to sleep, and being sick to my stomach from noises, and all those different things. They told me the nervousness was something would wear off; it was so soon after being wounded that it would wear off within a short time, and that the hip, it wasn't necessary to put that in, that it was in the Service Record; —it wasn't necessary to put it in, and I didn't need that on compensation because there was no provision made for it as regards compensation.

Q. When you were talking about this life insurance policy and the Metropolitan policy, what did you understand—was that a disability policy?

The Court: No, that has already appeared three times—a straight life.

Q. I want to now ask you again if you received certain letters while in vocational training complaining about your losing so much time?

The Court: He's said that.

Mr. Gibson: Now I ask in view of their putting this exhibit into the record, I want to read a certain part of this they put in the record.

The Court: You may.

(Def. Ex. H read by Mr. Gibson.)

Mr. Gibson: Report of J. T. Kelley, Officer and Supervisor in training * * * * * "Send man letter in regard to absence". Now I ask for that letter.

Mr. Curtin: They probably would send the letter to the man. We would not have it.

Mr. Berry—redirect.

Mr. Gibson: Have you a copy of that letter?

Mr. Curtin: I will look for it and try and find it if there was such a letter.

Mr. Gibson: I will read from another report of Mr. Kelly's. This is dated Feb. 15, 1922, and in answer to question 2 he says: Man was out from Dec. 21 until today; had abscess on stump of amputated leg and was operated on by Dr. Tierney. * * * * *

The Court: Who is that report to?

Mr. Gibson: That report is directed to—this is headed "Supervision Record" and I suppose it is report made by the field man to the Veterans Bureau office or whatever office was his superior.

Mr. Curtin: Your assumption is correct.

Mr. Gibson: What about those letters, Mr. Curtin?

Mr. Curtin: I will look in the files. It will take sometime to go through the files.

Mr. Gibson: Here's another one. This is dated Nov. 8, 1921, signed by some counselor; remarks on it * * * * *. Here's another report—Complete training history—dated Aug. 1, 1922 * * * * *.

(Recess at 12:30 until 1:30 p.m.)

(Tuesday, May 16, 1939, 1:30 P.M.)

Mr. Curtin: If Your Honor please, may I at this time substitute a photostatic copy in place of the original application to the Metropolitan Life Ins. Co.? Mr. Gibson has no objection.

The Court: Yes. (photostatic copy marked Gov't Ex. G prime).

Exhibits

LEROY A. BERRY, the plaintiff, recalled.

Recross examination by Mr. Curtin:

Q. Mr. Berry, I show you a paper headed "State of Vermont, Motor Vehicle Department, Operator's License Application 1934" and ask you if that is your signature? A. Yes sir.

Mr. Curtin: At this time I offer the paper on which the signature is identified.

The Court: Admitted. (Gov't. Ex. A-5).

Q. Did I understand you are married and have seven children? A. That's true.

Q. How old is the oldest child, Mr. Berry? A. Eighteen years old the day before yesterday.

Q. And the next oldest, will you just tell their ages? A. 16, 14, 12, 8, 6 and 2.

Mr. Curtin: You may inquire.

Mr. Gibson: That is all, Mr. Berry.

Mr. Gibson: At this time I wish to read to the jury from certain exhibits. I offer these (indicating).

Mr. Curtin: No objection.

The Court: Admitted. (Pltfs. Ex. 1-F, 1-G, 1-H, 1-I, 1-J, 1-K, 1-L and 1-M.)

Mr. Gibson: These are doctors' reports made by doctors of the Veterans Bureau. The first is Dr. Tierney whom you have already seen.

Pltfs. 1-F is the report of Dr. Taylor and Dr. Child

***** This is dated April 2, 1923.

Mr. Beede—direct.

Pltfs. 1-G report dated Oct. 15, 1923 signed by Dr. Child. * * * * *

Pltfs. 1-H report from Dr. John B. Wheeler dated March 13, 1924 * * * * *

The next one is Pltfs. 1-I dated Mar. 11, 1924, examination by Dr. Child * * * * *

You say Dr. Maynard is going to be here?

Mr. Curtin: Yes, I expect he will be here this afternoon.

Mr. Gibson: Then I won't bother the jury with that one.

This is Pltfs. 1-C—that's one I think I read this morning, of Dr. Drouin * * * * *

Here's Pltfs. 1-E, 4 pages, dated Dec. 5, 1932 signed by Drs. Maynard, Upton and Bock. * * * * *

Do I understand that the Government has offered—yes, this is in the record—A-3.

Mr. Curtin: That's right.

Mr. Gibson: This is his compensation payments. It starts with \$30.00 Mar. 29, 1919 until Sept. 11, 1930 it's \$44.00 approximately; there's one or two changes during 1919 and 1920. I will read that to you later. It's quite involved. Anyway, after 1930 he gets up into \$90.00 compensation and jumps to a hundred dollars in 1933. I think the evidence is this man put his war risk insurance claim in in 1931, in May.

LLOYD M. BEEDE called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Barber:

Q. Will you tell us your full name? A. Lloyd M. Beede.

Mr. Beede—direct.

Q. Where do you live? A. Hardwick, Vermont.

Q. What is your occupation? A. Well, I am interested in trucking and lumbering. I am Postoffice clerk at present.

Q. How long have you lived at Hardwick? A. I was born and brought up there.

Q. Are you acquainted with Mr. Roy Berry? A. We moved Mr. Berry on several occasions with our trucks.

Q. Will you tell us what those occasions were when you moved him? A. One occasion was when he moved from Sheffield to Hardwick to the Taylor house—from Sheffield, Vt. to the Taylor house in Hardwick.

Q. On that occasion did you observe Mr. Berry—observe his physical condition? A. Well, he said ———

Mr. Curtin: Just a minute ———

Q. Just what you saw? A. Yes, I did. I took a helper with me on that occasion because Mr. Berry was unable to assist in moving.

Mr. Curtin: Pardon, the question was “did you observe his physical condition”?

A. (continued) Well, yes, I did.

Q. And tell us what that was. A. Well, as I said before, we took a helper to help us move; although he was around there and did what he could—he carried out pictures and light things like that; he stubbed around and speaking of his physical condition, that night—this—the roads was rough and we had to make two trips of his furniture, and that night it was very late getting in the second trip—packing and unpacking—any of you folks travel over that road? No?—It isn't like our pavement here, and Roy set down in the chair—it was in the parlor as I remember—

Mr. Beede—direct.

in the Taylor house—the dining room and the parlor are practically one and the same room, only there's an archway cut between the two, and he says ———

Mr. Curtin: I object to any conversation, Your Honor.

Q. Did he complain to you about his condition? A. He wasn't a great hand to complain but this ———

Mr. Curtin: I object. The question was "did he complain to you"?

Mr. Barber: I withdraw the question.

A. (continued) Yes, he did complain to me at that time.

Q. What did he complain ———

Mr. Curtin: I object. This witness isn't a physician and it's purely hearsay whatever the conversation was with Mr. Berry.

The Court: Exclamations of pain?

Mr. Curtin: If Your Honor please, he's testifying to complaints as I understand it, not to exclamations of pain.

Mr. Barber: I withdraw the question.

Q. Did you hear Mr. Berry make any remarks relative to his physical condition—the way he felt—that night? A. Well, the last trip, as we were just finishing unloading, the helper and I—I can't say who the helper was ———

Mr. Curtin: I object to what he said.

The Court: I don't follow that rule,—did he hear and then what did you hear. Now did he hear? If he didn't hear anything he will say no.

Mr. Beede—direct.

A. (continued) If there's any question I will just say what he did. Perhaps that will explain it?

Q. All right. A. He sat down in the chair and he took off his left lower limb here (indicating) and he said—I won't say what he said, but what would you say in the same circumstances? He said "God, it's killing me"—pardon my language in the courtroom. He sat down in the chair and took off his lower limb.

Mr. Curtin: I object to the statement.

The Court: I will allow it to stand.

Q. Did you see the limb at that time? A. Yes, as I understand it, just once.

Q. Describe the condition as you saw it that night after that exclamation? A. It seemed to be red and somewhat festered I would say. Perhaps—that's hard to explain ———

Q. What do you mean by festered?

The Court: We all know what that means. That's common knowledge.

Q. You observed Mr. Berry all that day previous to the festering ——— A. No, just during that day. We arrived at his house in Sheffield probably at—oh, probably nine o'clock or half past nine we started out, and he stumped around during that day. He brought out mirrors and pictures and light things like that, but the heavy things he was unable to carry out.

Q. It was after that day that you saw this that you have told us about? A. It was the evening of that day. We had to make two trips and it brought it rather late. It was along toward evening.

Q. Did you help him move on any other occasion? A. I helped him move from the Taylor house, I should say about a

Mr. Beede—direct.

year afterwards, into a house in West End, that he purchased down there.

Q. Did you say Mr. Berry at that time helped you move?

A. Mr. Berry at that time was on crutches. He ordered part of the time. He was on crutches; he stubbed around that day, too. I will say he was game—he certainly was—he stubbed around with his crutches and carried out pictures and did what he could to help.

Q. Did you help him move on any other occasion? A. I can't say I helped him but our truck I think helped him once, to Mackville, Vt. but I wasn't there.

By the Court:

Q. That is a neighborhood in Hardwick? A. Yes.

By Mr. Barber:

Q. You were acquainted with Mr. Berry in Hardwick during this time? A. Well, Hardwick is a small town and I know most everybody.

Q. Have you seen him around town on other occasions except what you have told us? A. Yes, I have seen him—I won't say I meet him every day, but probably seen him twice a week or such matter; maybe more.

Q. Tell us whether or not he was on crutches some of the time that you saw him around there? A. He was on crutches at the time we moved him from the Taylor house to this other house, and I might say, yes, he was on crutches part but not all the time.

Q. Did you know of Mr. Berry's going into the trucking business? A. Well, naturally, in the same town.

Q. What did you observe about his operations in the trucking business? A. Well, they bought a truck—a Stewart truck—and I think he endeavored to do some trucking but I know personally my brother and I never worried much about it—there can't

Mr. Beede—direct—cross.

any one or two people do all the business anyhow and knowing his condition we realized—we admired his grit perhaps by going into it but we realized he couldn't do too much. He could do a little.

Mr. Curtin: I object to any opinion he might express about the situation in Hardwick.

The Court: That hasn't done you any harm yet.

Q. You were not afraid of his competition? A. We were not afraid, no, so to speak. We admired him for going into it, so to speak.

Cross examination by Mr. Curtin:

Q. What year was it you moved him from Sheffield to Hardwick? A. I should say in '33—I haven't the data here but I should say so.

Q. You never knew him before that time, did you? A. I believe that the first time I ever met him was when he came to the house to be moved from Sheffield to Hardwick.

Q. That was in 1933? A. I should say so.

Q. You don't know what his physical condition was in 19 — before that date rather? A. No, I have no way of knowing, not knowing him.

Q. Mr. Berry hired you to move him? A. Yes, certainly.

Q. Whatever work he did during the operation of moving him was entirely voluntary, wasn't it? A. He paid for what — well, we were working by the hour.

Q. Yes, but he was paying you to move him from Sheffield to Hardwick? A. Yes, he paid us to move him.

Q. You are supposed to supply the men? A. At the time he hired me he said—it was understood he was unable to move heavy articles and things and I had to bring a man with me to move them things.

Mr. Beede—cross.

Q. Will you just answer my question? A. Yes sir, I will be glad to.

Q. He hired you to move him? A. Certainly.

Q. And paid you for moving him? A. Yes.

Q. He wasn't working for your Trucking Company? A. We were working for him by the hour.

The Court: If he helped it reduced the time.

Mr. Curtin: I know Your Honor but I want the jury to understand Berry was not an employee of this man and whatever he did for him was entirely voluntary.

A. (continued) Berry never worked for our Trucking Company.

Q. When he went into this trucking business you were running your trucking company? A. Certainly.

Q. And your hours of labor at the trucking business was any time you got a job up until you got through? A. Well, it's a good deal like that. At the time we worked for the Woodbury Granite it was limited, more or less, because the quarries quit at four, but that has nothing to do with this case.

Q. You didn't have much opportunity to observe Berry and his work as a truckman? A. Yes, my brother and I are together in business and my brother looks after the business when I am here or away. When I am on the street soliciting business, or was at that time, he probably might be away with the trucks or looking after them.

Q. You don't know what jobs Berry had as a trucker? A. Well, I could enumerate them if you want I should—part of them any way; probably not all of them.

Q. You didn't go on the truck with Berry? A. Oh, no; of course, not.

Q. You don't know what he did in the way of work? A. I do know, if you want to bring it up. I do know he hired out

Mr. Garfield—direct.

to move stone for the Woodbury Granite Company but I guess he wasn't there—it was loaded by the derrick and unloaded with a derrick, and I guess his time was very short that he did that, because he was unable to do that very long.

Q. They load all trucks with a derrick? A. Yes.

Q. And it made no difference whether Berry or you? A. No, not a bit.

Q. You have seen Berry drive truck? A. Yes, I have seen him drive a car.

Q. You have seen him drive a truck? A. Yes.

Q. And how many times would you say you have seen him on crutches? A. Well, that's a hard question to ask over a period of years now but I would say several times.

Q. That is since 1933? A. Yes.

Q. You don't know definitely how many times? A. No, as I said at the time I moved him he was on crutches then, and I have seen him once or twice since. I couldn't say definitely.

Q. It was about three times you have seen him on crutches and have known him since 1933? A. I wouldn't say it was three or more or less because I haven't anything set down.

Mr. Curtin: That's all.

LESLIE GARFIELD called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Gibson.

Q. State your name. A. Leslie Garfield.

Q. Where are you working now? A. Brattleboro—at the Brattleboro Retreat.

Q. At the Brattleboro Retreat? A. Yes sir.

Q. Do you know Leroy Berry? A. I do.

Mr. Garfield—direct.

Q. When did you first get acquainted with Mr. Berry? A. I should say in the year 1933.

Q. Where were you living then? A. I was living on West End, Hardwick.

Q. And was that the year Mr. Berry moved into Hardwick? A. I should say so, yes.

Q. How long after that did you continue to live in Hardwick? A. I lived in Hardwick until a year ago this spring.

Q. Did you know Mr. Berry all the time he was in Hardwick? A. I did.

Q. And will you tell the jury what chances you had to observe him during that period of time? A. Well, I lived neighbor to him for approximately five or six years and I have worked for him at times that he's been laid up—and I wasn't working for him—I was doing other labors—I used to go up there and help him do the chores when he had stock.

Q. During that five years you knew him in Hardwick, tell the jury what you knew about his physical condition? A. Well, the first—about the first of my knowing him I was working for Lapointe in Hardwick—I used to deliver groceries to the family; and at that time I—that was the first I know he was disabled, and I saw him on crutches at that time, and from then—all the time I have known him I have seen him on crutches more or less, and in my work for him—I helped him considerable in and out of automobiles or trucks, and I have taken him to the doctor —

The Court: That is enough, isn't it?

Q. Have you seen his stump with the amputated leg on occasions? A. I have.

Q. Describe what you observed about that? A. Well, it was swollen and it was red and a sore like—I cannot describe the sore because I didn't examine it. I just saw it at a glance.

Mr. Garfield—direct.

Q. Have you ever seen Mr. Berry work more than two or three days with the artificial leg on, when he had to be on his feet for sometime?

Mr. Curtin: I object.

The Court: That is leading, of course.

Q. How long at a time did you observe Mr. Berry working when he had to be on his feet? A. Not but a short time.

Q. Tell the jury something more definite than that. A. I don't know as you can say definitely because when I worked for him he would help me for a short period of time—maybe a few hours, and that might continue like that for a day or two, and then he wouldn't be with me because he would be laid up at home. There was no two times exactly alike.

Q. Did you work for him while he was engaged in the trucking business in Hardwick? A. I did.

Q. Tell us about that. A. Well I believe at the time he bought the truck he employed me to work for him and drive the truck, and we went to look at a lumber job—trucking logs to Morrisville and Stowe, and I was hired with the understanding I would have to do most of the work but that he would help me what he could, and I think I made very nearly every trip on that job—I think I made every trip and most of them alone, from the job.

Q. Now on occasions did Mr. Berry drive this truck himself? A. I—you mean on the lumber job?

Q. Yes? A. I don't remember any time that he ever drove to the job.

Q. What about other trucking jobs, do you remember about that? A. I remember his hauling granite from the quarry and he made—well I should say two or three trips up there—I don't know exactly, and then he employed me to draw it from that same quarry to his place because he was unable to.

Mr. Garfield—cross.

Cross examination by Mr. Curtin:

Q. When was it you first became acquainted with Mr. Berry? A. I should say sometime in '32 or —

Q. Sometime after 1930 you will say? A. Oh yes.

Q. And you would go on the truck with him as his helper, would you? A. No, I was driving the truck.

Q. Didn't Berry drive the truck, too? A. Not that I remember of.

Q. You have been around different places where trucks were used—didn't everybody have a helper on their trucks as a usual thing? A. You mean the other trucks that drew on that job?

Q. Yes? A. There was no other helper on that job that I know of.

Q. Were there any other trucks on that job? A. There was other trucks on that job.

Q. How many worked on that truck? A. One man.

Q. Was he on there alone all the time? A. He was the driver.

Q. What's his name? A. Chauncy Clark.

Q. Berry was a strong man, wasn't he? A. When he was able to be about.

Q. Mr. Garfield, you were interviewed by a Government man at some time? A. I was.

Q. Didn't you tell the Government man that Berry was a very strong man—was a good lifter? A. I don't remember as I did.

Q. And when his leg wasn't sore he was in your opinion as good as two men? A. No sir.

Q. Did you ever state that the trouble with Berry was when he was feeling all right he would bull through the work and by sheer hard work would just wear himself out, and after four or

Mr. Hartwell—direct.

ve days of this type of work he would be down and out? A. That's true but I don't remember stating it.

Q. You recall that is true regardless of whether you stated
? A. When he worked it would lay him up but I don't remember stating that, no.

Q. You recall those facts were true, when he worked he worked so hard he wore himself out? A. He probably tried to. was the effort of trying.

Q. You don't recall ever stating he was a very strong man and a good worker? A. No sir.

Mr. Curtin: That's all.

WILLIAM H. HARTWELL called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Gibson:

Q. What is your full name, please? A. William H. Hartwell.

Q. Where do you live? A. Orleans, Vermont.

Q. Are you a brother-in-law of Mr. Berry? A. I am, sir.

Q. Are you married? A. Married, yes.

Q. Whom did you marry? A. Married Mrs.—Miss Olga Gilman.

Q. She was a sister of Fatima? A. Yes.

Q. How long have you known Leroy Berry? A. I have known Leroy Berry since 1922, in the fall of 1922.

Q. Where did you meet him at that time? A. I met him St. Johnsbury at his —

The Court: Never mind that.

Mr. Hartwell—direct.

Q. What did you observe about his physical condition at that time? A. The first time I seen him he was on crutches.

Q. How often did you see him thereafter? A. Continuing up until this present time.

Q. What do you say to the jury about his ability all during that time to be on his feet steadily? A. Very poor.

Q. Well, tell what you observed about him. A. Why, in one case in particular—we visited back and forth more or less—and once in two weeks he would come to my place, and if anything happened he didn't come, I would say to my wife "he must be laid up again with his leg," so we would get in and go and visit and see him.

Mr. Curtin: I move that statement "he must be laid up with his leg" be stricken out.

The Court: No, I will leave it in.

Q. When you went to see him what did you find? A. Just as I figured that he would be laid up—on crutches.

Q. Have you seen the stump of his leg? A. Yes sir.

Q. What have you observed about that? A. I have seen it in—when it was festered and big—I don't know what you call it but it looked like a boil to me, and see it after it has been lanced and a pretty sore looking article to me it was.

Q. Has that condition continued ever since you knew him in 1922? A. Ever since I knew him, off and on, up until now.

Q. Have you on occasions been with him to a fireworks exhibition? A. On one occasion.

Q. Tell us about that. A. Well, I—at night they had the fireworks there at ———

Q. Where? A. At Barton, at the Fair. I didn't really know anything about this situation until I saw the man—I didn't know what the trouble was with him, so I thought to myself "is he going crazy or what".

Mr. Hartwell—direct.—cross.

Q. Describe his appearance when those fireworks were going off. A. You know I was watching the fireworks myself and, of course, I might have been a little nervous myself because I have seen Service, and I didn't look at him so much, but my wife says "where's Roy going," so I looked to see where he was going and he was covering up his head with a blanket in the back of the car. Well I didn't know but he was crazy, so we got in and got out of there right away.

Q. Left while the show was going on? A. That was while this bombardment was still going on.

Q. Whether or not he was shaking and shivering at that time? A. Well, of course, I thought he was raving. That's the first of anything like that that I ever saw. Of course, I was jumping some myself but I didn't pay no attention to myself, I was just watching the fireworks.

Q. Did he become nauseated after that?

Mr. Curtin: I object to that question.

The Court: You put that differently.

Q. Did it have any effect on his stomach—this getting so nervous? A. Well, I couldn't answer that question.

Cross examination by Mr. Curtin:

Q. When was it you say you met Berry for the first time, in 1922? A. In 1922.

Q. Where were you living in 1922? A. I was living at Island Pond.

Q. Island Pond? A. That is after we got married.

Q. That is up beyond Burlington, isn't it? A. That is in Essex County, in the northeastern part of Vermont.

Q. Where was Berry living in 1922? A. In St. Johnsbury.

Q. How many years after that did you live at Island Pond?

Mr. Hartwell—cross.

A. That's the first place that I kept house after we got married. Right away after we see Berry on this—after we got married we went to Island Pond to live, to keep house after that right away.

Q. You have been there ever since? A. No.

Q. How long did you live in Island Pond? A. Two years.

Q. You lived there until probably 1924 or '5? A. Yes.

Q. Then where did you move to? A. Then we went from there into the town of Charleston.

Q. How long did you live in Charleston?

The Court: What do you care about that, Mr. Curtin?

Mr. Curtin: I want to show this man lived miles and miles away from Berry during the years.

The Court: He didn't see him very often, did he?

Mr. Gibson: Every couple weeks.

Mr. Curtin: It seems to me if a man comes on the witness stand and starts telling about a person's physical condition, I should have the right to show this man was living probably a couple hundred miles away—day after day—and wouldn't be in a position to know what the physical condition of this man was.

The Court: You have got him in Island Pond—that's only twenty miles away from St. Johnsbury and Lyndonville.

Mr. Curtin: Isn't that up near the border?

The Court: Yes, about fifteen miles from the border.

Mr. Curtin: How far is St. Johnsbury from the border?

The Court: It's thirty miles from St. Johnsbury

Mr. Hartwell—cross.

to Island Pond, and twenty miles from Lyndonville to Island Pond.

Mr. Curtin: That's quite a piece at that.

The Court: When you get over to Charleston you would be about five miles nearer?

Witness: Yes.

Mr. Gibson: How far is Wheelock from Charleston?

The Court: About twenty miles.

Q. Did you get married in 1922 and where were you working at that time? A. Working in Island Pond on the Railroad.

Q. On the Railroad? A. Yes.

Q. What were your hours of employment? A. Eight hours.

Q. Did you work every day? A. Yes, practically every day—five days a week.

Q. Five days a week? A. Yes.

Q. And how often would you go down to St. Johnsbury?

A. Well, that's about the only place we went at that particular time—probably once in two weeks, or once in three weeks; maybe we would go once every weekend. He would either be to my place or I would be to his. If he didn't come and he would let us know, and if he didn't let us know we would go down there.

Q. Where was Berry working in 1922? A. When I first saw him?

Q. Yes? A. I don't know that he was working—I don't believe he was working at that time; didn't even hold a job.

The Court: All right; call the next witness.
Thank you.

Mrs. Hartwell—direct.

MRS. ALGA HARTWELL called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Gibson:

Q. State your name, please. A. Alga Hartwell.

Q. You are the wife of Mr. Hartwell who just testified?

A. Yes.

Q. You are a sister of Mrs. Berry? A. Yes sir.

Q. Younger or older? A. Older.

Q. How long have you known Roy Berry? A. Since we were children; I was about eleven years old; I think he's seven or eight months older than I am.

Q. Have you known him—did you know him before the war? A. Yes.

Q. What was his physical condition before the war? A. Why, just like any young boy.

Q. Did you see him shortly after he returned from his war service? A. Yes.

Q. What can you tell the jury about his condition at that time? A. Well, I don't think—the first time I saw him after he came home he was in very bad shape.

Mr. Curtin: I object.

The Court: I will let it stand. Now specify.

A. (continued) Well, he had received his first wooden leg and it seemed to be very hard for him to travel on it. He was all right in the house on the hard floor but it was in the spring, on the farm, and of course, the yards are muddy—go down three or four steps to get on the ground, and up and down steps he had trouble hanging on the railing, and when he tried to walk on the ground it was—well, like a babe stumbling around.

Mrs. Hartwell—direct.

Q. How often have you seen him since his return from the war? A. Very often.

Q. Tell the jury now his general condition since return from the war as you observed him? A. Well, he was usually I would say—usually on crutches when you would see him.

Q. Have you seen his stump? A. Yes.

Q. Tell them about that. A. Well, it seems to be inflamed and painful and the places—the sore places look to me like boils, as if they needed opening like boils.

Q. How often have you seen his stump in that condition? A. Well, not very many times; never wanted to look at anything like that.

Mr. Curtin: I object to any further conversation.

Q. Have you observed him after he has been working two or three days, what the condition of his leg was? A. Well, that is when he has these bad places on it, when he's tried to travel or when he's tried to drive his car any distance.

Q. Has that been true to your observation ever since he was discharged from the World War Service? A. Yes, ever since I first saw him.

Q. Did you visit him at different times while he was on this farm in Wheelock? A. Yes, very many times.

Q. Tell the jury how that farm was carried on. A. Well, the farm was carried on by his wife, and we have four younger sisters; practically always some of them were staying with them on the farm, and they had little children themselves. His wife was brought up on a farm and I was brought up on a farm, and the farm work had to be done, and we all worked out doors. His wife carried on the farm practically; sometimes he had a hired man. One time in particular we went there and he had a hired man—this was in the winter—getting up the woodpile;

Mrs. Hartwell—direct—cross.

otherwise Mrs. Berry was doing the farm work—what was done.

Q. Was he able to do any garden work there? A. No.

Mr. Curtin: I object to that.

A. (continued) May I tell one time he tried on this farm to help gather sap?

The Court: Yes.

A. (continued) A. My father was laid up with blood poisoning and they were staying on the farm with my father and myself. I took a team to go to the sugar place to gather sap and Roy came out to help me. He couldn't help carry the sap. He gathered all he could and several times fell down in the mud—slippery going in the sugar place. We got the tank off the sled, took the sled and carried him to the house.

Q. Were you with Mr. Berry one day when he went to the Barton Fair—one night when there was fireworks? A. I don't think it was the Fair, but we went to the fireworks on Barton Fairground. In Barton they have fireworks on every occasion it's possible to celebrate with fireworks.

Q. What happened on that occasion? A. Well, we were enjoying it and Mr. Berry was standing next to me, and I noticed that he acted very strange, seemed to me.

Q. How? A. He was very pale and shaking violently.

Q. Have you been present at his home when there were thunder showers come up? A. I expect that I have but I didn't notice anything.

Mr. Gibson: That's all.

Cross examination by Mr. Curtin:

Q. You were married in 1922? A. Yes sir

Mrs. Hartwell—cross.

Q. And your husband was the last witness? A. Yes.

Q. How many children have you? A. Two boys.

Q. When were they born? A. One was born in 1923—in the fall of 1923, and one was born in 1938.

Q. 1923 and 1928? A. Yes sir.

Q. And you have always kept, as your husband says, kept house at Island Pond? A. No sir, we kept house—I don't think it was two years we kept house at Island Pond, but we kept house there when we were first married. We boarded for several months after we were married, and then we went keeping house, and then lived in Charleston on the farm for the summer, and then we went to Orleans village to live and lived there that winter, and then went to Massachusetts and worked a little while and then came back to my father's and went back to Orleans and have a home in Orleans, and we have always had a home in Orleans since, although we don't always stay there.

Q. Well, you went to Island Pond and then to Charleston?

A. Yes.

Q. Where did you go after that? A. To Orleans.

Q. To Orleans? A. Village.

Q. Then where did you move from Orleans? A. We moved our goods to my father's.

Q. Where is that? A. Sheffield.

Q. Where did you move from Sheffield? A. We moved back to Orleans but we were in several places, leaving our things stored in my father's.

Q. You went down in Massachusetts? A. Yes.

Q. What year was that? A. He worked in a factory—we were there three months I think. Well, it was 1924 or '5.

The Court: All right.

Q. What was Leroy Berry working at in 1922? A. He wasn't working that I know.

Mr. Gilman—direct.

Q. Do you recall him working at any time from 1922, or 1919, up to the present time? A. Well, if you call doing a day's work, working?

Q. Do you recall him doing any work, or working for anybody? A. I recall his trying to work.

Q. Well, we will put it this way. Do you recall him being on the payroll anywhere? A. I wouldn't know about his being on the payroll.

Q. You don't know where he worked during that period, or whether he worked or not? A. I don't know of any place he was employed or any of his wages or anything like that.

Mr. Curtin: That's all.

GEORGE GILMAN called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Gibson:

Q. State your name, please. A. George Gilman.

Q. You live where? A. Lyndon.

Q. Do you know Leroy Berry? A. Yes.

Q. How long have you known him? A. Well, principally since he was born.

Q. What was his condition of health before he went into the world war service? A. Why, by looks a good rugged young man.

Q. What did you observe about him after he returned from the world war service? A. Well, that he had lost a leg.

Q. Did you know him when he was in St. Johnsbury shortly after the war? A. Well, know him—just by seeing him and coming to see me and going there.

Mr. Gilman—direct—cross.

Q. By the way you were present when he was married?

A. Not when he was married but he had come to my place after he was married.

Q. Now what can you tell the jury about his leg condition then and as you observed it after the war. A. I don't know just what you mean by that—I observed his leg was gone, but at times I was with him more or less helping him—that is, he would come—I was to Hardwick and done a little cement work for him and a little plastering for him—laid some wall up for him on several occasions, but I cannot tell the particulars.

Q. Ever see him on crutches? A. Lots of times. In fact, he come to my place after me on crutches.

Q. Have you ever seen the stump of his leg? A. Yes.

Q. Describe what you observed about that to the jury?

A. Just the once was all I ever saw it. I never wanted to again because it was in such shape.

Q. What shape was it in? A. Blisters and festers.

Q. Have you observed as to whether or not he had trouble with that leg continuously after his world war service, as you observed it?

Mr. Curtin: I object.

The Court: I will admit it.

Q. repeated by reporter. A. Well, I saw him lots of times and lots of times he was going with his leg and I didn't know but what it was all right, and other times he was going on crutches. I couldn't tell how many times—lots of times.

Cross examination by Mr. Curtin:

Q. How long have you lived there? A. Fifteen years.

Q. Where do you live, Mr. Gilman? A. Lyndon.

Q. When was it Berry lived in Lyndonville, or didn't he

Mr. Gilman—cross.

live in Lyndonville? It was St. Johnsbury, wasn't it? A. He has lived in Lyndon, too.

Q. What year was it? A. I cannot tell you because I never kept no date of it.

Q. You know whether a matter of a couple of years or ten years? A. I think, 1933 he was in Hardwick, was it?

Q. 1933. A. I don't know.

Q. When was the first time that you saw Berry after he got out of Service? A. Right about the time he was married, if you can tell me when that was.

Q. April 1919. If that appears to be the time he was married, that was the time you saw him? A. Yes.

Q. Did I understand you were at the wedding? A. No, I was not.

Q. When was the next time you saw Berry? A. I said about the time he was married, at my home.

Q. Is Berry's wife any relation to you? A. Yes.

Q. What relation? A. I am an uncle to her I suppose.

Q. You are an uncle to Mrs. Berry? A. That's right.

Q. When was the next time that you saw Berry after the time you saw him about the time of his wedding? A. It might be in three days, might be a week, might be ten days.

Q. It might be a year? A. No, it wasn't.

Q. Do you know whether it was three days or a week or a month? A. No sir, I don't know because I didn't keep no date on it. I always saw him more or less for twenty-five years; or twenty years.

Q. You would see him and at some times when you saw him he would be practically all right? A. Practically, with his leg gone. I don't know whether he was all right or not.

Q. I mean from outward appearance? A. He would be all right for anything I would know.

Q. Only once you ever saw the stump? A. Just once.

Mrs. Berry—direct.

Q. What year was that in? A. When I was in Hardwick—the year I was in Hardwick and done his work over there.

Q. Could you give us a better answer than that as to time? 1933 or 1923, or what? A. 1933.

Q. 1933, so from 1919 to 1933 you had never seen his leg or what condition it was in? A. Never looked at it.

Mr. Curtin: That's all.

Redirect examination by Mr. Gibson:

Q. Have you visited him a lot of times at the farm in Wheelock? A. Lots of times I was up there.

Q. What did you observe about the farm work, who was doing it, etc.? A. Principally his wife done it.

MRS. FATIMA GILMAN BERRY called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Gibson:

Q. Your name is what? A. Fatima Gilman Berry.

Q. You are the wife of Leroy Berry? A. Yes sir.

Q. And did you know Mr. Berry before the world war? A. Yes, I did.

Q. Did he grow up more or less in your family? A. Yes.

Q. And what was his condition of health when he went away to war? A. Very good.

Q. Did you correspond with him during the war service? A. Yes sir.

Q. Did you learn while he was away of his having been wounded? A. Yes sir.

Q. Describe his return, can you, to the jury? A. You mean the first time he came to the house?

Mrs. Berry—direct.

Q. That is just what I mean. A. When he got his leave from the hospital in Massachusetts to come home, as soon as they would let him have one—after landing there—he got off the train at Lyndonville which is nine or nine and a half miles from my home; he had to hire a car there to bring him up home where I lived with my sister. They got—it was very muddy and bad from the village where they had to leave the main road—the farm is about two and one-half miles from Sheffield village—they got within a little over one-half mile from the buildings, and this driver didn't know the road, of course; and got into the ditch and got stuck. He see he couldn't get out, so he came on foot, up to the house. His sister and my sister and his brother were sick with the flu; there was no one doing their chores and I had to hitch up the team and go down where this car was and assist him out—help him. He had to lean on me, and helped him get into the team and we drove on up to the house. I don't remember who helped get this car out, or anything about it. Perhaps he got out himself after a time, because he certainly didn't come up to the house. I drove the team as close to the steps as I could so he could practically get from the wagon right on to the piazza and get into the house. Then I had to take care of the team. He was there ———.

Q. Was he on crutches at that time? A. He had crutches with him and had to use those to get along on the piazza and into the house and get into the first chair he come to; couldn't stand any longer. The leg was healing—practically healed but had to be dressed all the time. It was dressed and with all these bandages on was very big and we all had to be careful and not bump into him in any way or push anything that was going to touch him. He was sensitive. If he thought we was going to bump him he would grab it out of the way. He had to because it hurt so much.

Q. How long was he there at that time? A. I think he had ten days furlough.

Mrs. Berry—direct.

Q. When he was discharged did he come back there? A. When he was discharged in January he did.

Q. How long did he stay with you? A. He stayed off and on through the winter. He had relatives in Sutton, which is just a short ways away that he went to see—his grandmother and an aunt—and stayed with them part of the time, and the rest of the time he was there.

Q. What was the condition of his leg during this time? A. Well as I remember it he couldn't—around the house—wear the artificial leg at all. If he did go out doors with it and his crutches he could get to the barn, which was a short ways away. You had to go out doors but it wasn't very far, and he would get there on his crutches and stand on this or sit on a stool or bucket, because he didn't want to be in the house all the time, but he couldn't get around on uneven ground with crutches.

Q. When did you get married? A. We got married the 19th day of April.

Q. 1919? A. 1919.

Q. After you got married where did you go? A. After we were married we went to Boston on our wedding trip. The 26th Division were having a parade and he thought if we would go down there he would like to see the boys in his outfit. We went to Camp Devens and took our wedding trip in Boston, and came back home to my folks until we started for New York.

Q. Did anything happen in Boston at that time during the parade? A. Well, they wanted him in the parade but there was no way that he could unless he went in the cars and they seemed to be filled up.

Q. So he didn't go in the parade? A. No.

Q. Now then where did you go that spring? A. We went to New York.

Mrs. Berry—direct.

The Court: Have we got to go all through this now? Why not come to what this man's difficulty was? We know now where he went—to New York and Chicago.

Q. While at New York did you discover something happen while there were thunderstorms there? A. I certainly did.

Q. Tell the jury about that. A. The first hard thunder shower we had after we were there in New York,—I don't remember just when it was but it come during the night—we had gone to bed and I was asleep and I expect he was—I know he was but I woke up by his having right hold of me, pulling me out of the bed and shaking me. He wasn't awake, and I said "why, what are you doing" ———

Mr. Curtin: I object to any conversation.

Q. Did he make some exclamation? A. He did.

Q. What did he say? A. He shook me until I made him let go, and when he woke up and realized what he was doing ———

Mr. Curtin: I object to this description, Your Honor, on the grounds it is not possible for this lady to know what her husband was thinking about. She's describing his thoughts and it is common knowledge one does not know what somebody else is thinking about.

By the Court:

Q. Tell the effect the thunderstorm had. A. It had a very bad effect.

By Mr. Gibson:

Q. What effect did it have on his stomach?

Mrs. Berry—direct.

Mr. Curtin: I object to that question—it is very leading.

The Court: Allowed.

A. It has always upset it; always upset his stomach.

By the Court:

Q. Nauseated?

Mr. Curtin: I object to that Your Honor.

The Court: All right, I withdraw it.

By Mr. Gibson:

Q. In what way did it upset him? A. He gets very nervous and when he's nervous his stomach is upset.

Q. Now has that condition that you have described taken place during a thunderstorm continually from that time up to now? A. It has.

Q. Have you had an experience in going to a parade where there was martial music, with Mr. Berry? A. I have.

Q. Tell what happened on those occasions? A. He doesn't want to stay.

Q. Why? A. He doesn't want to hear it.

By the Court:

Q. What effect does it have on him? A. It has a bad effect on him.

By Mr. Gibson:

Q. What happens on the 4th of July? A. We never have been where there was any celebration or anything like that but twice. We can't get him to go.

Q. How did he appear on those occasions? A. I persuaded him to go to the first one that we went to, and when the

Mrs. Berry—direct.

fireworks started he stood the first one or two fairly good, but afterward he was very pale and nervous and didn't want to stay, and we didn't stay.

Q. Have you been in the movies with him when war scenes have come on the screen? A. Just once.

Q. What happened that time? A. We didn't—we went to this movie at St. Johnsbury and after a few scenes—the picture was an air raid—airplanes coming over and dropping bombs—he couldn't stand it and we got up and went out and went home.

Q. Now tell the jury in a general way what the condition of his amputated limb has been ever since your marriage, as you have observed it. A. He's tried to work at these different things ———

Mr. Curtin: I object to this as not responsive to the question.

The Court: No.

By the Court:

Q. Has it been inflamed or how? A. It has been.

Q. Much or little? A. Much.

Q. Continuously or spasmodically? A. Spasmodically.

By Mr. Gibson:

Q. What would he be doing before this inflammation would come on? A. Different things.

Q. That is, work? A. Yes.

Q. What effect did it have on this inflammation, on his leg, when he would stand on it for a length of time? A. He cannot wear the artificial leg if it gets inflamed—if it swells the least bit, which it does—he cannot wear the artificial leg during that time.

Q. All during your married life what has been the effect on this leg if he worked more than three days in a row? A. He's

Mrs. Berry—direct.

always had inflammation start up, and if he did try to keep on it it's brought on these abscesses. It will start the little fester and some one of them will get bigger and develop these abscesses and they have to be treated. He will have to be off from it from two weeks to a month, or longer, for this to heal and get back to where he can start again.

Q. During your married life has he complained to you at times of pain in another part of his body? A. Yes.

Mr. Curtin: I object. Why not ask her what he did; not tell her.

Q. All right, what did he complain of?

Mr. Curtin: I object to any complaint.

Q. What did you observe about his right leg—tell the jury that. A. His right leg, before a thunder storm or before a bad snow storm through the winter time, he always complains of it aching very badly.

Q. Has he been on crutches sometimes as a result of disability of his right leg? A. Yes, he has been.

Q. And for how long periods of time? A. A week or more.

Q. Now has he worked at any work where it required him to stand up or be on his leg continuously at any time during your married life, for more than three days in a row, to your knowledge? A. Repeat that, please.

Q. repeated by reporter. A. Not to my knowledge.

Mr. Gibson: That's all.

Mrs. Berry—cross.

Cross examination by Mr. Curtin:

Q. Mrs. Berry, while you were living in Lyndonville and St. Johnsbury, and Brattleboro now ——— you have a family of seven children? A. I have a family of seven.

Q. ——— of course, you stayed home and took care of the house? A. Not always. I am working now except for being right here. As soon as I get back to Brattleboro I have a job—\$5.00 a week.

Q. When was your first child born? A. She was eighteen years old Sunday.

Q. She was born May 14, 1921. Then you have—the next one is sixteen?

The Court: Let's not go through all that.

A. Sixteen.

Mr. Curtin: If Your Honor please, Mr. Gibson went rather thoroughly into it and I think I should be given the privilege ———

The Court: The man has given the age of the children—why repeat that?

Mr. Curtin: I want to show the children were borne by this witness.

Q. A couple years later you had another child? A. Eighteen months later I had one.

Q. During this time you were keeping the house and taking care of the children, that's true, isn't it? A. During the first two I was keeping the house and taking care of the children.

Q. You didn't know what your husband was doing at the garages during the day? A. I did.

Q. You weren't there every day? A. I was part of the time; go down afternoons and come home with him.

Mr. Berry—redirect.

Q. You knew Mr. Berry before he went in Service, did you not? A. I did.

Q. He got out of Service in January, was it, of 1919?

A. Jan. 2nd.

Q. And you knew his condition from then up until April of 1919—knew he had lost a leg and been wounded? A. Yes.

Q. Knowing that you married him? A. I certainly did.

Mr. Curtin: That's all.

(Recess of 10 minutes.)

Mr. Gibson: I wish to get on the record that there has been a disagreement between the Government and the veteran over this war risk insurance payment.

Mr. Curtin: The veteran applied for \$5,000 War Risk Term Insurance on December 1, 1917. On April 12, 1918 he applied for an additional \$5,000 War Risk Term Insurance. Aug. 31, 1919 it lapsed and claim for insurance was filed, informally, on May 26, 1931, and formal claim was made June 3, 1931, and the claim was denied March 3, 1936 and notice sent to the veteran on March 5, 1936; suit was filed apparently April 6 1936—it's timely filed—no question about that.

Mr. Gibson: May I ask Mr. Berry one more question?

LEROY A. BERRY recalled.

Redirect examination by Mr. Gibson:

Q. After you asked for this insurance when you were discharged, and advised as you have testified, when next did it come to your attention that you might qualify for this war risk insurance? A. In 1930, about 1930.

Mr. Berry—redirect—recross.

Q. How did that come to your attention? A. I read in the papers of veterans that were getting the insurance, either through suit or an application for it, that didn't seem to me as though they were as disabled as bad as I was.

Q. After that did you come to see some lawyer about it?

A. I went to see Mr. Conway of Barre, yes.

Q. Eventually you came to see me? A. Eventually we filed a claim.

Recross examination by Mr. Curtin:

Q. The first time you ever made claim to the United States Government for your insurance was, as has been stated here, in May of 1931? A. The first time I made claim in writing, yes.

Q. Did you ever make claim orally to anyone before?

A. At the time I was discharged.

Q. Whom did you talk to then? A. The discharging officer—I cannot tell you what his name was because I don't remember.

Q. Of course, you knew you could have kept your insurance up? A. I certainly could.

Q. That is, if you paid the premiums? A. Yes.

Q. And you have been paid compensation every month from the date of discharge to the present time?

The Court: We have been all over that several times, Mr. Curtin. He got it before he left.

Mr. Curtin: O. K. All right.

Mr. Gibson: The plaintiff rests. (3:15 p.m.)

Dr. Maynard—direct.

DEFENSE.

DR. ROBERT L. MAYNARD called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. Will you state your name and address? A. Robert L. Maynard, Burlington, Vermont.

Q. You are a physician? A. I am.

Q. Will you state to the court and jury your education and experience? A. I was educated at the University of Vermont, College of Medicine, graduated in the year 1911, and took an internship at the Mary Fletcher Hospital for eighteen months, and then started the practice of medicine in Burlington, specializing in surgery and orthopedic surgery.

Q. How long have you specialized as an orthopedic surgeon, Doctor? A. Well, practically more or less since I started practice, and have always assisted in that department.

Q. Will you tell the jury just what the field of Orthopedics embraces? A. That's the part of the surgical treatment that has to do with diseases and injuries of bones and joints.

Q. And a man who has suffered from an amputation of the leg would be classified as an orthopedic patient, wouldn't he? A. Yes, he would.

Q. And have you been associated or connected with the United States Government as a consultant in that line of work? A. I have.

Q. And how long have you been connected with the United States Government and with what department? A. Starting with the year or so after the war, when that was under the branch of the Public Health Service I believe, and then with the Veterans Administration—United States Veterans Bureau, and then the Veterans Administrations, since—I believe it was 1920—1919 or '20—somewhere around in there.

Dr. Maynard—direct.

Q. Have you handled practically all of the orthopedic work in the Vermont District of the Veterans Bureau? A. Yes, I have.

Q. At some time, Doctor, did you examine Leroy A. Berry, formerly of Lyndonville, Vermont? A. Yes.

Q. Have you your own records relative to that treatment? A. I have, yes.

Q. Will you consult your records and state the first time you examined Mr. Berry? A. Yes; the first examination was made January 23, 1930.

Q. Now Doctor, in order that I may clear up the records somewhat, I show you Pltfs. Ex. 1-J and Pltfs. Ex. 1-K, Pltfs. Ex. 1-L and Pltfs. Ex. 1-M and I will ask you if they are not the same reports that you have in your hands? A. They are. I have copies of those reports here in my own records.

Q. At the time of each examination, Doctor, you kept a copy and you sent a copy to the United States Veterans Bureau? A. Yes.

Q. These exhibits I have read to you, you have duplicates of those in your own personal file? A. Yes.

Q. Now, Doctor, will you look at your first examination—I understand it is January 23, 1930, is that right?

A. That's right.

Q. What was the history given you at that time, Doctor?

The Court: Why not let him tell us now?

Mr. Curtin: I think that would be better.

The Court: In general, and then if there's anything special you want to mention, go ahead.

A. Well, the history of the case isn't shown on this report. It was simply that there had been a war injury in which the patient had lost his—through which the patient had lost his left leg

Dr. Maynard—direct.

and received wounds of his right lower extremity, and his right face and chest and arm.

By the Court:

Q. Well what was the condition of the stub and his other injuries? A. I said in my report that the left leg had been amputated in the upper third at a point six and one-half inches below the knee; the stump is in fair condition although there are some small areas of skin irritation and callus from pressure; the scar is healthy; the ends of the tibia and fibula—those are the two bones of the leg—are very plainly felt as they're covered over with a scanty muscle flap, but are not sensitive, and there's no appearance of bone disease. This extremity shows considerable atrophy, it being $2\frac{1}{2}$ inches smaller in circumference, close to the body—that is in the thigh; 3 inches smaller just above the knee, and 2 inches smaller just below the knee. This atrophy is partly from disuse and partly from pressure on it from the artificial limb, and those parts always shrink with the use and wearing of an artificial limb. In fact the limb manufacturers want them shrunk first before they fit the limb. There's no evidence of nerve or vessel injury of this extremity. Most of the joints are normal. The right thigh and hip areas show three scars—one scar lies on the inner surface of the thigh, starts about one inch down from the groin and extends straight down the thigh for four inches; it's two inches wide; there's some loss of underlying soft tissues and the scar is depressed and adherent. There's no muscle hernia. The second scar starts at a point about one-half inch in front of the great trochanter—that's the bump you feel on the outside of your hip region—and level with it and extends down the outer surface of the thigh for three inches; it's one inch wide. The third scar extends upward from just above the great trochanter—that's the same bump—on to the side wall of the pelvis; that is, it ran up from your pelvic bone, and

Dr. Maynard—direct.

it is three inches long and one inch wide. Both these scars are slightly depressed and adherent and shows some loss of underlying soft tissue, but there's no nerve, vessel or bone injury. Function of the right hip joint and the other joints of this extremity is normal. There's a right rectus scar of operation where the appendix was removed, which is still healthy, strong and giving no trouble. That is all my examination discloses.

By the Court:

Q. Take your next one.

By Mr. Curtin:

Q. Did you have any history at that time given you of any nervous condition this man was suffering from? A. No sir.

Q. What is your practice in treating patients that come from the Veterans Bureau relative to any complaints which involve other fields of medicine? A. Well, to refer them usually to a specialist in that line of work. Unless I were asked for a general examination I would not report on—in any detail on the other condition, but I would mention it if it had been told me.

Q. If this man had complained of a nervous or mental disorder, or if from your observation of him as a physician you observed any condition along the lines of mental and nervous disease, would you refer him to a nervous and mental doctor? A. I wouldn't personally do it but I would incorporate in my report a recommendation for such examination.

Q. Doctor, did you make a diagnosis on Jan. 23, 1930 after you made your examination? A. Yes, I did.

Q. What was your diagnosis? A. Diagnosis was gunshot wound—GSW standing for gunshot wound—multiple, with amputation of left leg in the upper third.

Q. At that time, Doctor, you considered the disability as a severe disability, did you not? A. Yes.

Dr. Maynard—direct.

Q. On that date, Doctor, Jan. 23, 1930, when you examined him, did you discover any disability that would have prevented this man from carrying on in some occupation on that date? A. No.

Q. Have you in mind any work that he might do? A. Yes.

Q. Would you mind telling the court and jury what that might be? A. An occupation which did not require him to be on his feet all of the time.

Q. Could that be an occupation, Doctor, that would necessitate standing for some period of time? A. I beg pardon?

Q. repeated by reporter. A. Oh yes, and at that time I believe that I felt he could do sitting down occupations easily, and photographic work, and perhaps garage work, or tending garage pumps—running a filling station and things of that sort, that did not require him to do heavy work and did not require him to be on his feet all the time.

Q. Doctor, would these various wounds you found today, interfere to any great extent, outside of the wound where he lost his leg? Do they interfere with his movements? A. No.

Q. When was the next time you examined Leroy A. Berry? A. That was April 19, 1932.

By the Court:

Q. The same conditions? A. The same conditions.

Q. Same prognosis? A. Same prognosis.

By Mr. Curtin:

Q. Doctor, on that date did you find any condition which would have prevented him from working at some gainful occupation continuously, on April 1932? A. No.

Q. Was there any change in his condition as compared to the time you saw him in January of 1930? A. No change.

Q. Did you get a history on that date? A. I did.

Dr. Maynard—direct.

Q. Was the history any different in April 1932 as compared with the history in January 23, 1930? A. Only insofar as the fitting of the artificial limb and the comfort of it was concerned.

Q. What difference was that, Doctor? A. Well, the limb was in need of repair.

Q. What date are you referring to now when it needed repair? A. Well, I didn't refer to my records. Perhaps I am confused.

Q. I think that was in 1930, Doctor, if that will help you? A. No—I said in the routine report which asks if treatment is necessary—I said that the maximum treatment had been received with the exception that this claimant's artificial limb is now in poor condition.

Q. That was on what date, Doctor? A. April 19, 1932.

Q. Doctor, did you see Leroy A. Berry in August of 1930—August 16? A. No.

Q. I will show you Pltfs. Ex. 1-K and ask you if that is your signature, Doctor? A. It is.

Q. And due to the fact it is in evidence I would like to have you explain to the jury just what that paper is? A. This was a letter from me to Dr. Hall, the Regional Medical Officer in answer to a question from him as to what muscles were involved in the wounds of the right thigh.

Q. You have already described those wounds, haven't you? A. Yes.

Q. And the muscles involved? A. Yes; I didn't see the patient at that time.

Q. That is what I understood. Now, Doctor, did you examine Leroy A. Berry a third time? A. I did.

Q. What was the date of that last examination? A. Dec. 5, 1932.

Q. Now at that time did you get the same history that you obtained on the other two previous examinations? A. Yes,

Dr. Maynard—direct.

with the additional complaint of pain in the right lower extremity.

Q. Will you describe the complaint in detail and your findings relative to that additional complaint? A. The findings were essentially the same as in the other examinations, with the additional finding that there is a suggestion of sciatic irritation on this side with slight points of tenderness along the superficial points of the nerve; that is the sciatic nerve on the right side.

Q. Now, Doctor, in April 1932 and in January of 1930 he didn't have this neuritis, did he? A. No.

Q. Just what was that, Doctor? A. I don't know. It was apparently a sciatic irritation from some cause or other.

Q. You examined him and saw it was a temporary or permanent condition? A. Well, I had never found it before and it hadn't been complained of before, and so I would conclude that it was a recent development, and how long it lasted I don't know.

Q. Well, Doctor, there is a good deal of history here relative to nerves. Now the nerves at that particular point are something definite, aren't they? In other words, to distinguish them and show the difference between that—they haven't anything to do with a nervous condition, have they? A. No.

Q. And the last time you examined him, December 5, 1932, did you find any condition at that time that would have prevented this man from following a gainful occupation continuously?

A. No.

Q. In giving that opinion you have in mind the type of work already expressed that he could do? A. Yes, I have.

Q. Now, Doctor, at any time when Leroy Berry went to you for treatment, did he ever make any complaint about a nervous or mental condition? A. He didn't come to me for treatment primarily.

Q. Did he ever make complaint? A. Not to my knowledge.

Q. You examined him personally? A. I did.

Dr. Maynard—cross.

Cross examination by Mr. Gibson:

Q. Now, let's see, Doctor—you haven't any doubt that this is a severe occupational disability, have you? A. Well—I don't think I would want to put it that way. I have a doubt as to that.

Q. What? A. I have a doubt as to that.

Q. Didn't you say yourself in your report of 1930 "in my opinion this case should be rated as permanent partial and the disability classed as severe?" A. Yes.

Q. Didn't you say these injuries were severe? A. With reference entirely to his prewar occupation; what he was doing before he went into the Service.

Q. Didn't you say in your report that there is a decided occupational handicap in 1930? A. As to his prewar occupation.

Q. Did you say anything about his prewar occupation in your report of 1930? A. That's the thing that was always considered as under discussion as to ———

Q. I didn't ask you that, Doctor. A. Perhaps it was not specified just in that way.

Q. Let me ask you if you said this in April 1930 "there is a decided occupational handicap because of the disabilities described"? A. That is correct.

Q. You said that in April 1930? A. Yes, referring to his prewar occupation.

Q. Is there anything here that says that refers to his prewar occupation? A. No sir,—I don't know—let me see that just one minute; may be there is.

Q. You have a copy, haven't you? A. No, there's no specification there otherwise but that is the thing that was intended and that was the way in which it was usually put.

Q. You didn't take any history at that time I believe you said? A. No, I didn't say so.

Q. I thought you testified you took no past history but you

Dr. Maynard—cross.

made examination of the man as he came there at that time? A. No, I didn't say that.

Q. Did you take his history? A. Yes.

Q. And what history did you take? A. First as to his complaints, and as to what he used to do and what he was doing at the present time.

Q. Did you put the history you took in your report you made to the Veterans Bureau? A. No sir.

Q. It is really important in making a diagnosis to know a man's past history? A. Yes.

Q. Did you know he had been examined for a neuropsychiatric disturbance in 1930—the same year—by Dr. Drouin? A. I don't think I can answer that yes or no. I don't remember. I see no reason why I should go into detail as to who did the examining, etc., and so on, in getting the history. When a patient comes to me I ask him what he's complaining of.

Q. Did you take a history of the doctors that had examined him when you were taking his history? A. No, that didn't concern me.

Q. What did you take down as his prewar occupation? A. As a photographer and a farmer.

Q. So that if you had him down as a photographer, that was his occupational history, is that right? A. I have written something else here—I don't know as I can read my own writing now—as special salesman to the garage business.

Q. Let me ask you did you have his work down as a photographer before the war? A. Yes.

Q. For one thing? A. Yes.

Q. And when you made this statement you say you had in mind his work before the war, is that correct? A. That's correct.

Q. So considering his service as a photographer before the

Dr. Maynard—cross.

war, you thought there was a decided occupational handicap? A. Well, I will go further and say as a farmer.

Q. You considered both of them, didn't you? A. Not entirely; in combination, yes, but not specifically, no. On one condition, no.

Q. All right, when he first came to you and you first examined him, you found tender spots on his stump, didn't you? A. No.

Q. Well, you found spots of skin irritation on his stump? A. Yes.

Q. Are those tender, where skin has been irritated? A. Not necessarily. That is probably—you probably all have seen callus that have not been sensitive at all.

Q. You recommended he needed a new limb in 1930, didn't you? A. Yes.

Q. And because apparently it did not fit right—his present one? A. Well, I don't remember whether it was the fit or whether it was the mechanical condition.

Q. I guess it was the mechanical condition according to this report. Now I want to ask you about 1932 ———

The Court: That isn't any different.

Mr. Gibson: Oh yes, Your Honor.

Q. In 1932 you found—this is the April 1932 report—you said in your opinion that the disability was classed as severe, didn't you? I am referring to the April 1932 report. A. That's right.

Q. And at that time you also found that his limb—whatever it was—was not fitting him properly, didn't you? A. Well, I will have to refer to that. No, I didn't say it was not fitting properly. I said "it is now in poor condition; ankle joint does not work well; knee joint bushing clicks noisily and the elastic waist belt is useless." That was used to help hold the limb up.

Dr. Maynard—cross.

Q. Then did you say that in your opinion he could do manual labor at this time? A. Well, a certain amount of manual labor if it did not require him to be on his feet too long at a time and if it did not require him to do too heavy work.

Q. Did you say in your report of April 5, 1932 this—referring to the last sentence: "there is a severe occupational handicap because of the conditions described above which render hard manual labor out of the question"? A. I did.

Q. Was that the condition as you then observed him? A. Yes.

Q. So he couldn't at that time in your judgment do any hard manual labor? A. That's right.

Q. Now you looked him over again in December of 1932, didn't you? A. Yes sir.

Q. The last time? A. I did.

Q. And at that time was he able to do any work which required him to stand on this artificial limb for any length of time? A. I put it around the other way, that he couldn't do work that would require him to stand on it steadily or constantly.

Q. Let me ask you if you did not report at that time—calling your attention to the last sentence—"there is a severe occupational handicap because claimant is able to do no work which requires standing and no heavy work because by so doing both lower extremities are made worse"? A. Yes, I did say that at that time.

Q. That was the truth, wasn't it? A. Surely.

Q. His right limb was somewhat involved, and his both limbs were ——— A. That was because of his sciatic irritation, and I felt that he should be off his feet until that quieted down.

Q. So every time you saw him he had a severe occupational handicap? A. Yes, he did.

Q. Did you know when taking the history that on Sept. 27,

Dr. Maynard—cross—redirect.

1930 this man had a neuropsychiatric examination by Dr. Drouin.

A. I have answered that question already I believe—that I had no occasion to go into dates of that sort or to inquire as to who made the examinations, or how many other examinations were made, and he did not volunteer any information of that sort.

Q. As a matter of fact you were merely as an orthopedic surgeon and specialist, instructed to look at his extremities, isn't that correct? A. Well, yes, I believe that was the primary purpose of my examinations.

Q. Did you know in 1924 when he had been treated by Dr. Wheeler—you knew Dr. John B. Wheeler, of course? A. Yes.

Q. He had been to Dr. Wheeler for trouble in his sciatic nerve in his right leg? A. You said 1924?

Q. That is correct. A. I don't remember. As I have said before, in taking the history I asked the complaints and those were noted, and the examination was made and I had no occasion to ask who had examined him at other times.

Redirect examination by Mr. Curtin:

Q. Will you tell the court and jury which is best in the case of an amputation, a lot of the leg left or a short stump? A. Well, there are positions—there are optimum positions—what I mean, the best positions to make amputations in, and where this man had his amputation was the most desirable position according to—relative to the fitting of the artificial limb. It leaves him his own kneejoint and leaves him sufficient length of bone—they say six inches below the knee—that is the place where the limb manufacturers would rather have the amputation done. It is better for the person to have his own kneejoint motion than to be without it.

Q. Now, Doctor, you examined him first in January of 1930?

Mr. Bickford—direct.

The Court: Yes. We are not going over that, Curtin.

Mr. Curtin: If Your Honor please, I have just started the Government's case and have been sitting a day and a half while the plaintiff put his evidence in, and I would like the privilege of putting in our evidence.

The Court: You have taken at least three quarters of that time.

Mr. Curtin: They were not my witnesses. That's all, Doctor. Thank you.

LESLIE E. BICKFORD called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. What is your name and address? A. Leslie E. Bickford, Hardwick, Vermont.

Q. What is your occupation? A. Well I am with the Atlas Plywood and have been for about fourteen years.

Q. Did you at sometime have some business dealings with Leroy A. Berry? A. Yes.

Q. When was that? A. Well I hired him with his truck—he had a truck—to do some hauling logs. This was my own lot personally that I owned at that time and the first account that I have with him is here May 30, 1936, check for \$13.33.

Q. When was the last time you had any business relations with him? A. I think on July 4; it appears here I had another check of \$4.54.

Q. In 1936? A. Yes.

Q. \$4.54? A. Yes, \$4.54.

Mr. Bickford—direct.

By the Court:

Q. How much did you pay him altogether? A. \$120.52; that represented hauling by per thousand feet. These veneer logs were 16,705 feet; hauling was \$5.00 on those—come to \$84.52; bobbin logs 9,250 feet at \$4.00—\$37.00; the total payment would be \$120.52.

By Mr. Curtin:

Q. Berry wasn't a regular employee of yours, was he? A. No.

Q. In other words, probably I will put it right by saying you would call him when you needed him and he would do the work? A. Yes.

Q. At any time you called him did he fail to report? A. No, not that I remember.

Q. Would he drive the truck? A. Sometimes; not all of them.

Q. Did he do any of the work of loading the logs? A. Yes, helped.

Q. Did he have a helper on the truck? A. Yes.

Q. Now Mr. Bickford, you had quite a bit of contact with these truckmen, didn't you, in your work? A. Yes, we do all the time.

Q. Whether or not a driver has a helper with him as a usual thing on the truck? A. Yes, they have to have either a helper with them or someone at the landings to help for it's hardwood.

Q. Berry went on the truck and worked with the man unloading the logs while working for you? A. Yes, he and his helper worked together; that is, he had a helper with him.

Q. Do you recall he ran a filling station in 1936? A. Yes.

Q. Or 1937 I believe it was. A. I couldn't say just when but I remember buying gasoline of him.

Q. Did you used to go in there? A. Yes.

Q. Did you have an opportunity to observe him when he

Mr. Bickford—direct—cross.

was operating that filling station? A. Nothing more than drive up and get my gas and go along.

Q. Did he take care of you and give you service? A. Yes.

Q. In your opinion was he doing it in a capable manner? A. Sure; usually could.

Cross examination by Mr. Gibson:

Q. You have handled quite a lot of lumber? A. Yes—not too much.

Q. Haven't you handled quite a lot? A. Yes, some.

Q. You have hired a lot of people to work for you? A. Yes.

Q. Do you remember who else was hauling for you at this time?

The Court: What do you care about that? How possibly can that make any difference if he had five hundred others.

Mr. Gibson: I just want to check his recollection.

Q. Do you know Mr. Garfield? A. Yes.

Q. Was he hauling any for Mr. Berry at this time? A. Of course, he was working with him; I expect for him but I don't know.

Q. You haven't any recollection about that? A. No.

Q. Do you recollect Mr. Garfield drawing logs away from your place? A. He might have sometimes but I wouldn't want to state positive. Maybe he has but I wouldn't say he did and I wouldn't say that he did not.

Q. Your memory is somewhat vague about that? A. No.

The Court: You are excused. That's all, Gibson.

Mr. Briggs—direct.

R. A. BRIGGS called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. Will you state your name, where you live and what your business is? A. R. A. Briggs, Montpelier, General Agent of the Connecticut General Life Insurance Company.

Q. Are you here in answer to the subpoena to produce records relative to insurance papers of Leroy Berry? A. Yes.

Q. And will you consult the records and tell the court and jury when the application was made to your company?

Mr. Gibson: Objected to. This isn't the original application or the policy, I don't think. Unless it is I object to it.

Q. Have you the original application? A. No.

Q. What have you there?

The Court: Haven't you put that in already?

Mr. Curtin: No, that is the Metropolitan.

Q. What have you in the way of records, Mr. Briggs? A. I have here a register card which is the only record our Company has of the policy, with the data.

Mr. Gibson: I object to it.

Q. Are those the regular records of your Company? A. It is one of the regular records. The policy itself, application and medical report were destroyed in the 1936 flood at Hartford.

Q. Those cards or records you are reading from are kept in the usual course of business? A. That's right.

Q. And the original card record? A. They're the original card record.

Mr. Briggs—direct.

Q. Will you now consult the records and state the date on which Mr. Leroy Berry applied for insurance?

Mr. Gibson: Objected to; this is hearsay.

The Court: I will let them in.

Mr. Gibson: It's incompetent.

The Court: You have already proved it by Berry. He said he took out the policy.

Mr. Curtin: I thought it would be better to have the insuranceman tell.

Mr. Gibson: Exception.

A. The policy date was March 13, 1922; the amount was \$1,000.00; the plan was 20-payment insurance to age 55, monthly income; total premium was \$46.99 annually.

Q. Was a medical examination required before that policy could be issued?

Mr. Gibson: Objected to as incompetent.

The Court: Allowed.

Mr. Gibson: Exception.

A. Yes.

Q. Was the policy issued according to your record?

Mr. Gibson: Objected to.

The Court: Why ask him? You have already proved it by Berry. This man does not know whether issued except by some memorandum.

Q. From the records, does it indicate the policy was issued?

Mr. Gibson: I don't think he made this memorandum himself.

• *Mr. Briggs—direct.*

Mr. Curtin: The law of 1936 in Congress allows practically any record in.

The Court: Tell him.

Mr. Gibson: Exception.

Mr. Curtin: Any record kept in the usual course of business, any writing or paper.

The Court: This is not one of those. This is some memorandum he has taken off himself.

Mr. Gibson: No, he didn't even take it off himself.

Mr. Curtin: This is coming in under exception—might be hearsay.

Q. Was the policy issued?

Mr. Gibson: Objected to as hearsay.

The Court: All right.

A. Yes.

By the Court:

Q. How do you know, you never saw it, did you? A. No.

The Court: That's stricken out. You are excused.

• Mr. Curtin: That goes to the weight of the evidence—not the admissibility of it.

The Court: Yes, it does. You don't need any law when the plaintiff himself says he took the policy; it was issued to him and he paid for it quite a while.

Miss Connor—direct.

MISS BLANCHE CONNOR called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. Will you state your name and address? A. Blanche Connor of Lyndonville, Vermont.

Q. You are the treasurer of the Lyndonville Creamery?
A. I am.

Q. You are here in response to a subpoena? A. Yes.

By the Court:

Q. Have you a record of the milk this man sold you? A.
Yes.

Q. Give it to us. A. Well I have a complete statement of all the deliveries. Mr. Berry in 1924—Leroy A. Berry was a producer in our creamery beginning September of 1924. For the remainder of that year he delivered 314 pounds of butter fat, the value of which was \$140.95. In 1925 from Jan. 1 to July 15 he sent both cream and milk; 8944 pounds of milk and 71.6 pounds of butter fat, the value of which was \$240.96. In the year 1926 from Feb. 16 through June 15 he delivered 3626 pounds of milk and 173.7 butter fat, the value of which was \$154.04. At that time he gave an order to J. A. Bates and out of that total Mr. Bates received \$77, so it was really 50% to Mr. Bates. In the year 1927 Mr. Berry delivered from Jan. 1 through the year—or from January 1 to April 30, and from May 1 to 15, the last half of October and November, through December, 3683 pounds of milk and 74.8 butter fat, the value of which was \$125.01, out of which we paid orders to Mr. Bates \$46.02. In 1928 from January 1 through June 15 he delivered 91.7 pounds butter fat, value \$44.87, making a total paid Mr. Bates \$123.02 and total to Mr. Berry \$582.81.

Mr. Woodbury—direct.

Cross examination by Mr. Gibson:

Q. Was the price of milk better then than it is now? A. Very much better.

Redirect examination by Mr. Curtin:

Q. Did he deliver the milk or bring it over to your creamery?

A. We collected.

Q. They collected it? A. Yes.

C. E. WOODBURY called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. State your name and address, please. A. C. E. Woodbury, St. Johnsbury.

Q. What is your occupation? A. I run a garage—manage it.

Q. Manage a garage? What's the name of the garage? A. The St. Johnsbury Garage.

Q. Do you know Leroy Berry? A. I do.

Q. When did you become acquainted with him? A. I don't know. I can't tell you.

Q. Did he work for you at some time? A. He did.

Q. What year was it he worked for you? A. I don't know to tell you the truth.

Q. Well, if the records indicate it was in 1922? A. That would be about right.

Q. How long a period of time was he in your employ? A. Why I should say a year and a half.

Q. By the way, was he in vocational training at your garage? A. He was at the very first of it.

Mr. Woodbury—direct—cross.

Q. Did he afterwards become employed by you? A. He did.

Q. When he was in vocational training did you pay him any salary? A. \$15.00.

Q. And what was his work while he was at your garage?
A. General garage work.

Q. How was his working ability—was he a good repair man? A. He was a good repair man, yes.

Q. What were the hours in which your garage was open?
A. Seven to six.

Q. And how many days a week? A. Six.

Q. Was he ever out sick, as you recall it, back there? A. Yes.

Q. What sickness was he suffering from? A. From his leg.

Q. How often did this happen? A. Well, I—that would be hard to say but perhaps a day a week or something like that.

Q. How frequently would he be absent? A. That would be hard to tell; sometimes he would work—along in warm weather it bothered him more than it did in the winter months.

Q. Would it be a matter of months between the time he would absent himself? A. Not always.

Q. Was he able to do a good day's work while employed at your garage? A. He was.

Cross examination by Mr. Barber:

Q. This fifteen dollars you said he received when he was in vocational training, was that a full week's work? A. No, he got so much a day. When he lost a day he lost his pay.

Q. Did that same condition happen afterwards when you took him on the regular force at the garage? A. Yes.

Q. There came a time when you and Mr. Berry parted ways? A. Pardon?

Q. repeated by reporter. A. Yes.

Dr. Hall—direct.

Q. Tell us what the reason for that was? A. Well, he lost so much time.

Redirect examination by Mr. Curtin:

Q. What year was that, Mr. Woodbury, he started losing time? A. That was when he was on as a regular mechanic.

Q. Do you recall what year it was? A. I do not, no.

Q. Was it some years ——— A. I should say 1923 or somewhere along in there.

Q. It was after he got out of vocational training? A. After he got out of vocational training, yes.

Q. You don't know what the reason was for his not reporting for work, from your own knowledge? A. Not from my own knowledge—only what he told me.

The Court: That is admissible—what he told you.

Mr. Curtin: That is hearsay.

The Court: No, what the plaintiff says is admissible against him.

Mr. Curtin: It is admissible when against his interest but not admissible when hearsay and favorable.

The Court: You are excused.

DR. GEORGE G. HALL called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. Will you state your name and address, Doctor? A. George G. Hall, Hartford, Vermont.

Q. And you are a physician, Doctor? A. Yes.

Q. Will you tell the court and jury your education and experience? A. I graduated from the Hahneman Medical Col-

Dr. Hall—direct.

lege and Hospital in Chicago, Illinois in 1897, and private practice until March 1924; since then connected with the Veterans' Administration.

Q. Are you a full time medical doctor for the Veterans' Administration? A. Yes.

Q. Are you the medical officer in charge of the Veterans' Administration Facility at White River? A. No.

Q. You are the medical officer over there, aren't you? A. I am a medical officer there. I am Chief of the Out Patient Service, but not the Chief Medical Officer.

Q. You are Chief of the Out Patient Service? A. Yes.

Q. Now at some time did you examine Leroy Berry? A. Yes.

Q. Incidentally, your practice has been general medicine—general practice of medicine? A. Yes.

Q. Have you done any specializing? ~~X~~ No.

Q. I show you Pltfs. Ex. 1-D and ask you if that is your signature appearing thereon? A. Yes.

Q. What is that, Doctor? A. This is an examination March 11, 1924.

Q. That you made on Leroy Berry? A. Yes.

Q. Will you consult the exhibit and state what his complaints were to you at that time? A. Weakness and cramps and pain in right hip and amputation of the left leg; shell wound of right hip.

Q. Did you examine him on that date? A. Yes.

Q. Did you make a diagnosis? A. Yes.

Q. What was the diagnosis, Doctor? A. There was no general medical diagnosis. The special examinations were made by Dr. Wheeler and Dr. Childs and the diagnosis was amputation stump of left leg, gunshot wound in right hip, neuritis following a neuroma, gunshot wound right thigh.

Dr. Hall—direct—cross.

Q. Doctor, would any of the history given you on that date indicate the presence of any nervous or mental condition? A. No.

Q. Did your examination of this man bring out or indicate to you the presence of any nervous or mental condition? A. No.

Q. Doctor, what is that date now? A. March 11, 1924.

Q. On March 11, 1924 when you examined him, from your observation and examination of Leroy Berry, was there any condition then existing that would have prevented him from carrying on continuously at some gainful occupation, from a general medical standpoint? A. No.

Cross examination by Mr. Gibson:

Q. You made a prognosis after you made your diagnosis, didn't you? A. Yes.

Q. Your prognosis is what? A. Guarded I believe.

Q. Guarded—that means you have some doubt in your mind as to this man's amputated leg and his right hip? A. It's a conservative prognosis.

Q. In other words, you have doubt in your mind as to what the future is going to bring to that man, that is correct? A. Yes.

Q. That was your prognosis in March of 1924, wasn't it? A. Yes.

Q. Now, Doctor, you would say he did have at that time a severe handicap, didn't he? A. He did.

Q. Certainly he was more than half disabled, wasn't he? A. Not from a general medical standpoint, he wasn't.

Q. But from an occupational standpoint? A. From a general medical standpoint I would say he wouldn't be. From an orthopedic one he did have a severe occupational handicap.

Q. Did your board of three recommend a permanent partial disability of 65 per cent? A. If that is what it states, that is what the Board recommended.

Dr. Hall—cross.

Q. In other words that meant he was at least that much disabled from doing work that he was fitted for, didn't it? A. Yes.

Q. I notice on this report the words "N. P. condition—see report of Dr. Child attached hereto". A. I see.

Q. What do the letters "N. P." stand for? A. Neuro-psychiatric.

Q. So there was an examination of his nervous condition made at that time? A. There was.

Q. Where is that report? A. I do not know.

Q. It should be attached to that sheet, shouldn't it? A. Well—it was made at this time I am very sure.

Q. So that at that time there was some question in your minds if he didn't have a nervous disability, wasn't there? A. Yes.

Q. In other words, you wouldn't have bothered to have had that examination made? A. No.

Mr. Gibson: Has the Government that N. P. examination made with this?

Mr. Curtin: You have every examination report that I have in my files.

Mr. Gibson: Where is it?

Mr. Barber: What's happened to it?

Witness: The diagnosis is carried forward to the Board of three report there, you know.

Q. But the N. P. report isn't here, is it? A. The diagnosis is.

Q. But the N. P. examination report isn't? A. It isn't incorporated in there.

Q. You haven't any independent recollection of it, have you, Doctor? A. No.

Dr. Hall—cross—redirect.

Q. Do you know who made it? A. Dr. Childs.

Mr. Curtin: His name is on there.

By the Court:

Q. Do you know where he was practicing? A. This examination was made the second day of my coming into the Veterans' Service and Doctor—I was taking Dr. Childs place.

Q. Is he living? A. He was the last I knew.

Q. Do you know where? A. He was in Plymouth, New Hampshire—my last knowledge of it.

By Mr. Gibson:

Q. Again calling your attention to this to refresh you, is it true that at the time you examined him in March 1924 that the stump of this amputated leg was somewhat irritated? A. Yes.

Redirect examination by Mr. Curtin:

Q. Doctor, the degree of disability as found in these various reports was based on the man's occupation before he went in the army, wasn't it? A. The degree of disability is found—they're rated on that basis; the examinations are not always made on that basis; they're made on the findings.

Q. Yes, but the prewar occupation—that is occupation before going into Service, is considered when coming to a decision of the percentage of loss? A. It is.

Q. And Dr. Childs—H. T. Childs—who is referred to in this report as making the examination—the N. P. examination—he's one of the signers of this report, isn't he? A. Yes.

Mr. Drown—direct.

WARREN E. DROWN called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. State your name and address, please. A. Warren E. Drown, Lyndonville, Vermont.

Q. What is your occupation? A. I am a farmer.

Q. Do you know Leroy Berry? A. I do.

Q. When did you first become acquainted with him? A. Why, he came to work for me in the fall of 1920.

Q. Were you running a garage at that time? A. Yes.

Q. Was he in vocational training for the Government? A. He was, yes.

Q. Did you pay him while he was trained at your place? A. Yes.

Q. How much did you pay him a week? A. I think it was \$10.00 a week.

Q. Now, Mr. Drown, what was he doing at your garage in 1920? A. Why, general garage work. That is, he was an apprentice but he was being—under instruction of the head mechanic.

Q. Now what kind of a pupil or student did he make? Was he quick to pick up knowledge? A. Yes sir.

Q. What kind of workman was he? A. He was a very good workman.

Q. When did he work for you—what period of the year was it? A. Well, sometime I think in December of 1920—the very first of December and from there until the first days of May.

Q. What were the hours of employment at your garage? A. What was the hours?

Q. Yes? A. We put in ten hours most of the time.

Mr. Drown—direct—cross.

Q. When did you open up in the morning, what time? A. We opened by seven o'clock sharp.

Q. And closed at? A. Well, six and seven, just as the work came in.

Q. How many days a week was your garage open? A. Open seven days in the week.

Q. How was Berry in attending to his work as far as reporting for work? Did he miss much time? A. Why, he lost some time.

Q. Much? A. I don't recall that he did a great deal.

Q. Did Berry drive a car when working with you at your place? A. No.

Q. Didn't he have an automobile? A. He didn't have an automobile.

Q. Have you ever seen him at your place when he took his leg off? A. No.

Q. He always had the artificial leg on? A. Yes.

Q. Was he a satisfactory employee as far as you are concerned? A. He was as far as I could—as far as I was concerned.

Cross examination by Mr. Barber:

Q. Mr. Berry started the automobile business in your garage, didn't he? A. Yes.

Q. He didn't know very much about mechanical parts of automobiles? A. Not to start with. He had worked at it a little the year before.

Q. But when you say he was a good mechanic, you mean he was a good mechanic with his training, with what he knew? A. As far as he had gone, yes sir.

Q. What kind of work did you do around the garage, Mr. Drown?

Mr. Bates—direct.

The Court: What do you care about that?

Mr. Barber: He said he doesn't recall he missed much time.

Q. Were you there, Mr. Drown? A. Well, I was away some because I was on the road. We had four cars at different times we were selling and I wasn't —

Q. Who was in charge of Mr. Berry? A. My oldest son, Roy.

Q. Is he the one who has already testified here? A. Yes.

Q. He would know more about what time Mr. Berry missed than you would? A. I think so.

~~JESSE BATES~~ called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. State your name and address, please. A. Jess Bates, Sheffield, Vermont.

Q. Is Sheffield a nice town, Mr. Bates? A. Yes.

Q. Do you know Leroy Berry? A. Yes.

Q. Will you tell the court and jury when you first met him and how you happened to become acquainted with him? A. Probably about 1924 when he was in the garage with Roy Orcutt of Sheffield. He did some work for me and I bought some gasoline there.

Q. What kind of work did he do for you, Mr. Bates?
A. General repair work.

Q. Was it good work? A. Yes, he was a good workman.

Q. Have you ever seen Berry working? A. Yes.

Q. How did he work as far as you saw him? A. He was a good—that is, I considered him a good garageman.

Mr. Bates—direct.

By the Court:

Q. A good mechanic? A. Yes.

By Mr. Curtin:

Q. Did he show any disability as far as getting around and doing his work was concerned, as you observed him? A. No, of course, he was lame but got around and did very satisfactory work.

Q. How often did you see him working? A. Oh, I couldn't tell but I had my work done there while they were in the garage and bought my gasoline there; probably two or three times a week.

Q. Did you request Berry to do your repair work when you went to the garage for any work done? A. Yes.

Q. You felt he was a very good mechanic? A. Yes.

Q. Now for how long a period of time were you able to observe Berry while he worked, since 1924 when you first met him? A. Do you mean at any one time?

Q. No, a period of years?

The Court: No, the time you were a customer there and saw him.

A. Probably two or three years; I cannot remember how long he was there in the garage but while he was there—two or three years.

By the Court:

Q. Did you know him while he was a farmer there in Sheffield? A. Yes, I did.

Q. See much of him then? A. Yes, quite a lot.

Mr. Bates—direct.

By Mr. Curtin:

Q. In fact you had business dealings with him while he ran the farm? A. Yes.

Q. You sold him some cows? A. Yes.

Q. How many did you sell him? How many times did you have business dealings with Berry relative to his farm?

A. About four I should think.

Q. Did you observe Berry when he was operating the farm—on the farm? A. Not to any great extent.

Q. Did Berry ever do any other work for you? A. Yes.

Q. Tell what he did? A. I believe he repaired a gasoline engine for me one time, after he left the garage, and he thawed out some water for me at one time—probably about the time he went into the garage and before.

Q. How was his work along those lines? A. Good.

Q. How long did he work for you in repairing the pump or whatever it was? A. A water ———

Q. A gasoline pump? A. He took the engine to his place and repaired it and brought it back.

Q. How long a time did he work on the water pipes? A. As I recollect it, about a half a day.

Q. Now at some time did you visit Berry at his farm? A. Yes.

Q. Did you go around the farm with him? A. Yes, I did.

Q. How long a time did you spend looking the farm over?

A. Probably two and a half or three hours, and possibly a little longer.

Q. Did Berry have any difficulty walking—going around the farm—when he showed it to you? A. He got around as well as I did. He didn't hold me up any.

Q. At the present time you are a member of the School Board in Sheffield? A. I am.

Mr. Larrabee—direct.

Q. Do you hold any other public office over there? A. I am constable and tax collector. I have been overseer of the poor.

Mr. Curtin: That's all.

Cross examination by Mr. Gibson:

Q. In every deal you had with Mr. Berry, he was a good honest dealer with you? A. Yes, he was.

Q. A man of his word? A. Yes.

Q. And told the truth? A. Yes.

Q. And do you recollect he was only in that garage one summer with Mr. Orcutt? A. I don't remember how long he was in there.

Q. The garage was closed in winter, wasn't it? A. Yes, I believe so.

Q. Then he sold out to Mr. Davison, isn't that true?

The Court: Yes. You are excused.

GUY W. LARRABEE called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. State your name and address. A. Guy W. Larrabee, Hardwick, Vermont.

Q. You were Adjutant of the American Legion Post at Hardwick? A. Yes.

Q. You still are? A. No, I am not.

Q. You are Village Clerk at Hardwick? A. Village Clerk and Treasurer.

Q. Do you know the veteran? A. Yes.

Q. Have you observed him around Hardwick for a period of years? A. Yes.

Mr. Larrabee--direct.

Q. Do you know whether or not he's able to get around?

A. Oh yes, he's around.

Q. Ever see him drive an automobile? A. Surely.

Q. Does he impress you as having much difficulty in being able to get around?

Mr. Gibson: Objected to.

The Court: That is leading and you have been leading right along. Gibson hasn't noticed it.

Mr. Gibson: I have but I have let it go.

Q. Do you recall him operating a truck? A. Yes.

Q. Ever see him operate a truck? A. Yes.

Q. Tell what you observed about him working and what you have seen him do. A. Well, of course, in his work I wouldn't see him only as he would drive by the office or some place like that. I am in the office from eight to five. If anybody happened to go by in the street I would naturally see him.

Q. You have seen him drive truck? A. Yes.

Q. Whether or not you have seen him when operating the filling station in 1937? A. Yes, I have seen the filling station.

Q. Do you recall when he worked for the P. W. A.? A. I know he was on the payroll.

Q. What was his job on that? A. He was listed as a jack-hammer man.

Q. That is one of those—pick up concrete with?

Mr. Gibson: I object to this unless he knows of his own knowledge.

A. I paid him.

Mr. Gibson: Objection withdrawn.

Mr. Larrabee—cross—redirect.

Cross examination by Mr. Gibson:

Q. He was on the P. W. A. payrolls for about three days as you recall it? A. A little longer. I believe, sir.

Q. Less than a week? A. Would you like to know definitely?

Q. Of course, I would. A. The payroll ———

Q. Tell us how much pay he received and for what days.

A. Week ending May 12, 1934 he was—Thursday eight hours, Friday four hours, made a total of twelve—sixty cents an hour—\$7.20.

Q. A day and a half that week. All right? A. May 19, 1934—Monday 8 hours, Tuesday 1 hour, Wednesday 8 hours, Thursday 5 hours, total 22 hours—60c an hour, \$13.20. Those are the only two payrolls his name seems to appear on.

Q. Let me ask you this—there would be days at a time you wouldn't see Mr. Berry, isn't that true? A. I wouldn't want to say that. That is probably natural any way—a lot of people ———

Q. You want to tell the truth here, don't you? A. Surely.

Q. What's the truth? A. There might be days I wouldn't see him.

Redirect examination by Mr. Curtin:

Q. Was there much jack-hammer work?

Mr. Gibson: Objected to. This man doesn't know.

Mr. Curtin: All right.

(Recess taken at 4:32 p.m. until 9:30 tomorrow morning.)

Mr. Ainsworth—direct.

(Wednesday, May 17, 1939, 9:30 A.M.)

VERNE AINSWORTH called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. Your name is Verne Ainsworth? A. Verne Ainsworth, yes.

Q. You were formerly chief of police in Hardwick? A. I was.

Q. Did you know Leroy Berry? A. I did.

Q. When was this you knew him? A. What's that?

Q. What year was it you became acquainted with him?

A. Well, I don't know, about the first of his coming to Hardwick I guess.

Q. Did you observe him during the years he lived there?

A. Well I knew of him, that's all. It has been five or six years since I knew any great about him—to know him personally, I guess.

Q. Did you observe him while he was living in Hardwick?

A. Well, I saw him different times, yes.

Q. Did you notice anything about him that indicated to you a disability? A. Well, I thought he got around pretty well for a man that had lost his leg.

Q. Did you ever see him drive a car? A. I have.

Q. Ever see him drive a truck? A. Yes.

Mr. Gibson: I didn't object yesterday to these leading questions but I object, if the Court please. Let him tell what he saw.

The Court: I don't know what you are going to do about it. I cannot stop Mr. Lawyerman from asking them any more than I can stop you. I have tried for

Mr. Ainsworth—direct—cross.

forty years and I have given it up. I am glad to have you notice he is asking them. You didn't notice it all day yesterday but once.

Mr. Gibson: I guess I would have had the same success yesterday that I have had this morning.

The Court: That's right.

Q. Do you recall the time when he ran a filling station? A. I do.

Q. Did you observe him during that period? A. I used to see him quite often then.

Q. Will you tell just what he did during that time and how he acted? A. Well, I saw him waiting on customers there—getting around—the same as any man would, that's all—pumping gas.

Q. Now Mr. Ainsworth do you recall him driving a car? A. I saw him driving a car a number of times.

Q. Do you know whether or not he drove for hire? A. Yes, did one time any way.

Q. Will you tell ——— A. He took my wife and a bunch of other people to Montpelier, once.

Q. And do you know whether or not they paid him for that trip? A. What's that?

Q. repeated by reporter. A. Yes, they paid him.

Q. How much did they pay him? A. Four or six dollars, I cannot tell which.

Mr. Curtin: You may inquire.

Cross examination by Mr. Gibson:

Q. How far is it from Hardwick to Montpelier? A. It's 28 miles I think.

Q. Take about forty-five minutes to drive? A. Yes.

Mr. Clow—direct.

Q. And go back? A. That's right.

Mr. Gibson: That's all.

CLAYTON CLOW called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. You are Clayton Clow of Hardwick? A. Yes.

Q. And you are a bookkeeper for the John B. Hall Association? A. Yes.

Q. Have you the records of the John B. Hall Association relative to payments made to Mr. Berry? A. Yes.

Q. Will you consult those records and tell us what they show? A. Well, the records show that from October 20, 1935 to December 12, 1935 Mr. Berry made nineteen trips to the quarry, hauling granite. He was paid at the rate of ten cents per cubic foot.

Q. How much was paid to Mr. Berry during that period? A. \$62.14.

Q. Now what was his job as far as the John B. Hall Co. was concerned? A. Well, he wasn't actually on the payroll—he owned his own truck. He drove truck and received his pay on the basis of so much per cubic foot of granite.

Q. That Company hired Berry to haul granite, is that true? A. Yes.

Q. And whether or not he worked when the work was there for him? A. Yes, he did.

Q. Was there any other truck hired or any other person hired during that period to haul granite? A. Not during that period, no.

Mr. Clow—direct—cross.

Q. How many trips a day would he make during that period, if you know? A. Well, of course, there would be days he wouldn't go at all, and other days when he would go—I should say he would average two trips a day.

Q. How many miles would these trips involve, in mileage?

A. Sixteen miles—eight miles each way—approximately that.

Q. When did he get through with your Company? A. In December 1935.

Q. And will you tell me how he happened to get through—what the reason for it was? A. The quarry was closed for the winter at that time.

Q. Was his work satisfactory during that period? A. Yes. Yes, it was.

Mr. Curtin: You may inquire.

Cross examination by Mr. Gibson:

Q. Did you observe whether Mr. Berry did all this trucking or not? A. Yes.

Q. I mean himself? A. Yes.

Q. Did he have a driver? A. No.

Q. Didn't Mr. Garfield work there for him? A. Not as I recall. Mr. Garfield might have driven two or three times, but Mr. Berry did the majority of his own work.

Q. So of these nineteen trips you say it is fair to say Mr. Garfield made two or three of those? A. Yes.

Q. And between October 20 and December 12 you think may be Mr. Berry put in about eight days of work, is that correct?

A. Well, figure it on the hour basis you mean?

Q. No, figure it on two trips a day when he was working?

A. Well, yes, I think that would be close enough. No, because there was nineteen days—he worked nineteen days during that period.

Mr. Barney—direct.

Q. I thought you said nineteen trips? A. I might have but it was nineteen days.

Q. Nineteen days at \$62.40—so how much was he paid per day then if it was nineteen days and he drew \$62.40? How much did he get for trucking per day? A. I don't know.

Q. Don't you think it was trips instead of days? A. No.

Q. You are sure your figure is right of \$62.40? A. I am absolutely sure.

Q. You think he only got \$3.00—a little over \$3.00 a day for himself and his truck hauling granite? A. It averaged up to about that.

Mr. Gibson: That is all.

ALBERT W. BARNEY called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. Your name is Albert W. Barney? A. Right.

Q. From St. Johnsbury? A. Yes.

Q. And what is your occupation, Mr. Barney? A. Automobile dealer.

Q. Do you know Leroy Berry? A. Yes.

Q. When did you first become acquainted with him? A. I think it was around 1920.

Q. 1920? A. Yes.

Q. Mr. Barney, were you in the Service? A. Yes.

Q. Whether or not you are disabled? A. Well, I was rated some when I was discharged.

Q. How much?

Mr. Barber: How is that material?

Mr. Barney—direct—cross.

Q. withdrawn.

Q. Did you run a garage in 1920? A. No, I did not.

Q. Did you work in Wright's Garage? A. Yes.

Q. And did Mr. Berry work with you there? A. Yes.

Q. Will you tell what you observed about him relative to his work? A. He was a good mechanic.

Q. What were the hours of work per day in Wright's Garage? A. Ten hours a day.

Q. Pardon? A. Ten hours a day.

Q. And how many days a week was the garage open? A. It was open seven days a week.

Q. Did Mr. Berry work during that period? A. Well, he worked just—he didn't work seven days a week.

Q. How many days a week did he work? A. Six days.

Q. State whether or not as you recall it Mr. Berry worked steady? A. Well, as I remember it, he worked pretty steady.

Q. Do you recall the amount of wages paid to him at Wright's Garage? A. I think it was \$2.50 a day in the summer and \$1.00 a day in the winter.

Q. Did you have an interest in that garage, Mr. Barney? A. Not at that time.

Q. Did you later ——— A. Yes.

Q. ——— acquire some interest in it? A. Yes.

Q. When did you sell out your interest? A. It was in 1928.

Q. 1928? A. Yes.

Q. Were you still working there when Berry left? A. Yes.

Q. Did you know why Berry left Wright's Garage? A. No.

Cross examination by Mr. Gibson:

Q. You were kind of a sales manager there, weren't you?

A. Yes.

Mr. Barney—cross.

Q. And kind of in charge of sales? A. Yes.

Q. And your business wasn't so much having to do with the mechanics? A. Well, just before that I was foreman of the shop, yes.

Q. Just before Mr. Berry came there, is that right? A. Yes.

Q. He came there as an apprentice? A. Yes.

Q. Under vocational training? A. Yes.

Q. Have you any very clear recollection about his work record at that time as to whether he did not lose a lot of time or not? A. His work record?

Q. Let me ask you that again. Have you any very clear recollection as to whether or not Mr. Berry worked regularly at that time? A. Well, not very.

Q. Do you recall his being out at one time for a week and a half right after he came there? A. No.

Q. By the way, were you working there in 1921? A. Yes.

Q. At Wright's? This was in 1921 was it? A. Well, I don't just remember exactly the year of it. I was there from 1919 on.

Q. Did there come a time when a man from the Veterans Bureau or somebody came around to check up on Mr. Berry occasionally? A. Yes.

Q. And made records? Do you remember a Mr. Cummings that used to come there? A. I wouldn't remember the name, no.

Q. Do you now have a recollection he did not average more than half to two-thirds his time working there at that time? A. I wouldn't remember that.

Q. You don't remember really much—as to how much time he was there, do you? A. Not exactly the amount of time, no.

Q. It's perfectly possible, as far as you know, that he may have been out a good deal of the time, as far as your recollection

Mr. McDonald—direct.

back now seventeen or eighteen years goes? A. Yes; I don't remember very distinctly.

Redirect examination by Mr. Curtin:

Q. Mr. Barney, did you ever see Berry use crutches or a cane while you worked at the Wright Garage? A. No.

Q. Do you have a recollection of his being absent a great deal or very little? A. I really don't remember distinctly on that, just exactly.

Mr. Curtin: That's all.

MARTIN McDONALD called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. Your name is Martin McDonald? A. Yes sir.

Q. You are from St. Johnsbury? A. From Danville.

Q. Do you know Leroy Berry? A. I did at one time.

Q. When was that, Mr. McDonald? A. That was I would say in 1921.

Q. And where did you become acquainted with Mr. Berry?

A. I worked in Mr. Morrill's garage.

Q. Are you a mechanic, Mr. McDonald? A. I was at that time.

Q. Did you work with Mr. Berry in 1921? A. I did.

Q. Will you tell just what your observation was of his condition at that time and how he worked? A. Well, he seemed to be able to do a good day's work—did the same general repair work as the rest of us.

Q. What were the hours of work at Morrill's Garage?

A. We begun at seven and we usually worked until six, or later if we had to.

Mr. McDonald—direct—cross.

Q. How many days a week were you open there? A. Six days a week.

Q. Will you state what type of a mechanic Mr. Berry was?

A. He was a good all-round mechanic.

Q. Did you observe the work he did? A. Yes.

Q. Whether or not it was satisfactory work. A. Yes, I think his work was very satisfactory.

Q. Did he do his share of the work while employed at Morrill's Garage? A. Yes.

Q. Did you buy the business at Morrill's Garage later on? A. I did.

Q. And how long did Berry work at Morrill's Garage after you bought the business? A. Not at all.

Q. Will you state the reason why he got through at Morrill's Garage after you bought it? A. Because we didn't need so much help and we had plenty—three other mechanics, and the work wasn't enough to warrant keeping him on.

Q. You had three other mechanics? A. Yes.

Q. And state whether or not these three other mechanics were working longer than Berry had worked?

Mr. Gibson: I haven't objected to leading questions for quite a while.

The Court: All right—it's leading—well enough.

Q. repeated by reporter. A. Yes, they were.

Mr. Curtin: That is all.

Cross examination by Mr. Gibson:

Q. Let's see—at that time you say Mr. Berry was a good mechanic? A. Yes.

Q. That was before he went to work for Wright's Garage, wasn't it? A. I don't know.

9

Mr. McDonald—cross.

Q. Wasn't it immediately before he went to work for Wright's Garage? A. I don't know when he went to work for Wright's Garage.

Q. Do you remember when it was you bought out the so-called Morrill's Garage? A. I cannot tell the exactly—the exact date but I think sometime in 1921.

Q. What part of 1921? A. Spring of '21.

Q. Would you say you bought out Morrill's Garage in July of 1921? A. It might be in July—the first of July.

Q. The first thing that you did upon purchasing this garage was to discharge Mr. Berry, wasn't it? A. Yes.

Q. As a matter of fact, Mr. Berry had only been working at the trade of learning the auto mechanic's job for two or three months at that time? A. I don't know anything about it.

Q. You don't remember that? A. No.

Q. Do you recollect he was an experienced mechanic when working at Morrill's Garage? A. I recollect that his work was satisfactory.

Q. No, answer my question please.

Q. repeated by reporter. A. I wouldn't say experienced mechanic.

Q. As a matter of fact wasn't he an apprentice at that time? A. He was taking the training.

Q. And just started in taking training? A. I don't know anything about when he started.

Q. You chose to keep the other three mechanics and let Mr. Berry go? A. I did.

Mr. Gibson: That's all.

Mr. Morrill—direct.

CALVIN F. MORRILL called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. Your name is Calvin F. Morrill? A. Yes sir.

Q. You were the owner of Morrill's Garage at St. Johnsbury? A. At Danville.

Q. Morrill's Garage was in Danville? A. Yes.

Q. When did you own this garage, Mr. Morrill? A. I built the garage in 1912.

Q. Were you operating it in 1920 and '21? A. I was.

Q. Did you know Leroy Berry? A. I did.

Q. State whether or not he worked for you at your garage in Danville? A. Yes.

Q. What year was that, Mr. Morrill? A. I think it was '21.

Q. What were the hours that your garage was open during the day? A. Well, the mechanics were supposed to work ten hours. I was on the job for longer.

Q. You were on the job twenty-four? Well, the usual day's work was ten hours, is that it? A. Yes.

Q. How many days a week was the garage open? A. The garage was open seven days, but the mechanics only worked six.

Q. The mechanics worked six? A. Yes.

Q. Now will you state what you observed about Berry while he worked for you as a mechanic? A. Well, he was a very willing—a good worker.

Q. State whether or not he had any difficulty in performing the duties assigned to him? A. No.

Q. Was he able to do any work under a car? A. Yes.

Q. And state about how he was able to operate while work-

Mr. Morrill—direct—cross.

ing under a car? A. He would get in and out from under a car as quick as anybody.

Q. You sold your garage to McDonald, the last witness?

A. I did.

Q. Do you know when you sold it to him? A. I think it was the first of August.

Q. Was that in 1921? A. 1921.

Q. During the period Berry worked for you, state whether or not his work was satisfactory? A. Very satisfactory.

Q. How much did you pay Mr. Berry? A. \$2.50 a day I think it was.

Cross examination by Mr. Gibson:

Q. Now, Mr. Morrill, this was quite a while ago, wasn't it, that this happened? A. Yes.

Q. Do you have any recollection of how long he worked at your garage? A. I think he commenced there the first of May and worked until I sold out.

Q. As a matter of fact you sold out about the first of July, didn't you? A. No, I think it was the first of August, but I wouldn't be sure.

Q. You might be mistaken about that? A. Might be.

Q. And Berry came there as an apprentice? A. He did.

Q. He never had been a trained mechanic, is that correct?

A. No.

Q. And he was being taught the business of being an auto mechanic at your place? A. He was.

Q. And I suppose these other mechanics that were more experienced, got a good deal more pay than Mr. Berry? A. Some of them.

Q. You haven't any records, have you, of how steadily he worked? A. No.

Q. And you haven't any very clear recollection about it,

Mr. Ellsworth—direct.

have you? A. Well, I can tell he was there most of the time. He might have been out some days.

Q. As a matter of fact don't you recollect he did lose quite a lot of time? A. No, I don't think he did.

The Court: All right; call the next witness.

KIRK L. ELLSWORTH called as a witness by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Curtin:

Q. You are Mr. Ellsworth? A. Yes.

Q. What is your first name? A. Kirk.

Q. You are an official at the Registry of Motor Vehicles for the State of Vermont? A. Yes.

Q. Have you the records relative to Leroy Berry and his applications for license and registration? A. I have photographic copies.

By the Court:

Q. Well, was he given permission to drive from such time to such time, continuously? A. From 1919 to 1939.

By Mr. Curtin:

Q. Mr. Ellsworth, in the application for driving license, does it contain a statement as to any infirmities that the applicant might have? A. Yes.

Q. And did Mr. Berry answer that question? A. Yes.

By the Court:

Q. What's the question? A. "Have you any physical or mental infirmities, such as loss of arm, fainting spells, impaired

Mr. Ellsworth—direct—cross.

eyesight, etc.?" Answer—"Yes." "If yes, what?" "Loss of left foot."

By Mr. Curtin:

Q. Is that the only infirmity he recorded in his application? A. Yes.

Q. Mr. Ellsworth, did Mr. Berry have a particular type of license during the years from 1920 up to the present time? A. He had what is known as a Professional License from 1920 to 1927, inclusive, and then the regular license.

Q. What is meant by a Professional license? A. That was a Chauffeur's license that was discontinued in 1927.

Q. Will you tell me just exactly what added powers did it give Mr. Berry, if any? A. Not any, except that he would be licensed to drive vehicles for hire.

Q. In other words, it did give him some further power as an operator of a motor vehicle in Vermont, in that he could hire himself out to drive parties? A. Yes.

Mr. Gibson: Why don't you take the witness-stand?

Mr. Curtin: I think I will. I will offer these, if Your Honor please?

The Court: Admitted. (Def. Ex. A-5 6 pages.)

Mr. Gibson: No objection.

Cross examination by Mr. Gibson:

Q. Let me ask you, you don't mean to say he had a license in 1919, do you? A. No.

Q. So if you said that before, that was a mistake? A. Yes.

Q. The first license was 1920, is that correct? A. Right.

Deposition of J. C. Hestwood.

Mr. Curtin: Mr. Clerk, have you some depositions?

Clerk: Yes.

Mr. Curtin: May it please the Court, this is a deposition taken of J. C. Hestwood of New Kensington, Pa., taken pursuant to the notice to take depositions ———.

The Court: Read it—never mind the preliminaries. You will treat this, Gentlemen, just as if the witness was here to testify.

"IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF VERMONT.

LEROY A. BERRY

v.

THE UNITED STATES

} *Law No. 1183.*

DEPOSITION

Pursuant to Notice of Taking Depositions on Thursday, October 14, 1937 at 11:00 o'clock, A.M., before Walter Crytzer, Alderman, 317 Ninth Street, New Kensington, Pennsylvania, and the place of taking said depositions being designated as the office of said Alderman, the party designated in the original Notice to take depositions having been served, and the day and time having arrived to take the testimony of J. C. Hestwood, appears.

Deposition of J. C. Hestwood.

APPEARANCES

J. C. Hestwood—Witness.

Albert S. Yoder and Stephen B. Ewing, both of New Kensington, Pennsylvania, with Ernest W. Gibson, Jr. of Brattleboro, Vermont, as attorneys for the Plaintiff.

Stanley Granger, Assistant United States District Attorney for the Western District of Pennsylvania, of Pittsburgh, Pennsylvania, appeared in behalf of the United States of America.

Mr. J. C. Hestwood, having been duly sworn according to law, testified as follows:

Direct examination by Mr. Granger:

Q. Please give us your name. A. J. C. Hestwood.

Q. Where do you live? A. New Kensington, Pennsylvania.

Q. What is your occupation? A. Assistant to the Manager of the Specialty Sales Division of the Aluminum Cooking Utensil Company.

Q. Mr. Hestwood, please state if you know Leroy A. Berry, or if there was any contract or employment between your Company and Mr. Berry? A. Mr. Berry entered into a contract to sell our products on February 14, 1930.

Q. And when did that contract expire? A. It expired on December 31, 1930.

Q. Was it renewed? A. No, it was not.

Q. Mr. Hestwood, relating to Leroy A. Berry, did your Company keep any record of his contracts or his employment with the Company? A. We have a record of his weekly sales reports.

Q. And do you have that weekly sales report with you?

A. I do.

Q. And has that report been under the custody and charge and control of your Company and more particularly of yourself?

A. Yes, since the origin of the contract.

Deposition of J. C. Hestwood.

Q. Will you kindly let me see the records, if you please?
(Mr. Hestwood hands Mr. Granger the record.)

Mr. Granger: For identification purposes, please mark this "Government Exhibit No. 1".

Q. Mr. Hestwood, I show you Government Exhibit No. 1 and ask you what it is? A. That is a record of Mr. Berry's weekly sales reports.

Q. Mr. Hestwood, this is a summary of the weekly sales report. Is that correct? A. The figures shown on the Exhibit are the totals taken from the original sales reports.

Mr. Granger: The Government offers in evidence at this time Government Exhibit No. 1.

No objection by the Attorney for Plaintiff.

Mr. Granger: At this time the Government respectfully requests the withdrawal of the original Government Exhibit No. 1 and offers a substitution thereof of a copy of the records as shown on Government Exhibit No. 1.

No objection by the Attorney for Plaintiff.

Cross examination by Albert S. Yoder, Esq.:

Q. Mr. Hestwood, were you employed by the Company in February, 1930, at the time this contract was entered into? A. Yes, I was.

Q. Did you know Mr. Berry personally? A. No, I never met Mr. Berry.

Q. In your work with the Company you had no occasion to contact the various salesmen? A. Not this particular man.

Q. And he worked for the Company for a period of approximately 10½ months? Is that correct? A. His contract was active during that time.

Deposition of J. C. Hestwood.

Q. Did his contract provide for a salary, or for commissions? A. Commission only.

Q. Was he allowed any expense account? A. No, he was not.

Q. Was he furnished any automobile or other means of transportation in connection with his work? A. No.

Q. Does your record, as shown by Government Exhibit No. 1 show the amount of commission paid to Mr. Berry during the period he worked for the Company? A. Only in an indirect manner. It shows the amount of his sales and we could determine from that the approximate commission.

Q. Did the commission on different items vary, or was the commission uniform on all items? A. On all items the commission was the same. Would you like me to explain that? The difference lies between orders sold for cash and orders sold on the installment plan.

Q. Does your record there show the amounts of his orders sold on the installment plan and the ones sold for cash? A. No, it does not.

Q. What percentage was paid to Mr. Berry on the different sales he made? A. 30% on installment business and 40% on cash business.

Q. Referring to the record which has been identified as Government Exhibit No. 1, will you state the total amount of sales made by Mr. Berry during the period of his employment? A. Mr. Berry reported sales here are \$2,194.00.

Q. And you say that you have no way of determining what part of those sales were credit sales and what part were cash sales? A. Not from these records.

Q. Had a 30% commission been paid on the total given by you, then he would have earned \$658.20, or at a 40% commission, it would have amounted to \$877.60, is that correct? A. I will have to figure that out.—That is correct.

Deposition of J. C. Hestwood.

Q. Then would you say that somewhere between those two figures would be the total amount of compensation paid by the Company to Mr. Berry during the time of his employment?

A. You understand that the total sales reported may not exactly agree with the shipments actually made for Mr. Berry. Assuming that he actually sold everything that he reported, that is correct.

Q. And out of that total compensation paid to him, he would have to pay his own sales expense, would he? A. He would.

Q. And his own travelling expense? A. That is right.

Q. How many salesmen were working for the Company at about this period of 1930? A. Approximately one thousand.

Q. How did Mr. Berry's sales compare in volume with that of other salesmen? Was it more or less? A. Considering the amount of time devoted to the work and the fact that Berry had comparatively little experience in our business, I would say that his sales were average.

Q. About the average? A. Yes.

Testimony closed.

(signed) WALTER CRYTZER

Alderman.

317 Ninth Street,

New Kensington, Pennsylvania.

My commission expires First Monday in January, 1940.

*Deposition of J. C. Hestwood.**Government Exhibit No. 1.*

Date—1930 (Week ending)	Days	Hours	Sales
March 8	3	28	\$153.35
March 15	3	25	No sales
March 22	6	33	100.00
March 29	3	19	54.70
April 12	3	17	102.35
April 19	6	51	368.65
May 10	6	33	103.65
May 17	6	40	147.65
May 31	4	22	103.20
June 7	3	19	138.30
June 14	6	40	279.25
June 21	3	18	92.15
July 12	5	26	108.15
July 26	6	22	34.20
August 2	5	30	113.60
August 9	6	36	157.85
August 16	1	6	20.20
August 23	3	22	No sales
September 13	5	25	11.05
September 27	6	39	106.00
October 11	6	45	No sales

Mr. Curtin: The Government rests Your Honor.
(10:15 a.m.)

Mrs. Berry—direct.

REBUTTAL

MRS. FATIMA A. BERRY called in Rebuttal testified as follows:

Direct examination by Mr. Gibson:

Q. Mrs. Berry, during this time when you husband was working for this Aluminum Company, who did the soliciting and the work, etc.? Tell the jury. A. Mr. Berry usually took his car and went out and made the arrangements for the supper with some lady who was willing to put it on, and would ask her to bring in five or six couples of her friends who were interested in this new method of cooking with the Wearever utensils, and on the night she said it would be convenient for her to have them come to her home, we would go and get there about five o'clock and put on potatoes, meat, vegetables—or I fixed those and he talked to this lady about the supper—starting them cooking. I watched them cooking to see they were coming along all right, and the people would come about seven o'clock. In the meantime I would set the table—if the hostess didn't have that already done—and the people came in. We served the materials. He used to carve the meat if she wished that it be done in the kitchen, and we served the supper. There was a moving picture machine went along with this. When he gave the sales talk I cleared the dining room table and done up the dishes—done up our dishes so they were clean for inspection, and then done up her dishes. While they were in the living room he would hang up the curtain and give a very interesting sales talk. He could do that, and I did the work in the kitchen. He made arrangements with each couple to call on them within the next day or two—within two days from the supper, and if he wasn't able to drive the car I would drive the car and he made the call. He done the talking and I done the work.

Motion for Directed Verdict.

Q. Who bought the food? A. We bought the food for those suppers and that was taken out of our commission.

Mr. Gibson: The plaintiff rests (10:18).

Mr. Curtin: I wish to make a motion for a directed verdict.

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

LERROY A. BERRY

v.

UNITED STATES OF AMERICA.

At Law
No. 1183.

MOTION FOR DIRECTED VERDICT

Now comes the defendant, the United States of America and moves this Honorable Court that it direct a verdict for the defendant for the reason that there has been no substantial evidence adduced at the trial of this case upon which the jury could properly find that the insured became permanently and totally disabled while the insurance sued upon was in force.

THE UNITED STATES OF AMERICA

By TIMOTHY A. CURTIN,

Attorney, Department of Justice.

Charge.

The Court: Motion denied and the defendant has an exception.

Opening argument for the plaintiff made by Mr. Barber at 10:34 A.M. * * * * * (11:00).

(Recess of 15 minutes.)

Mr. Curtin closes the Government's case at 11:15 A.M.
* * * * * (11:50).

Mr. Gibson closes for the plaintiff at 11:50 A. M. * * *
* * * (12:15).

CHARGE. (12:15)

Gentlemen of the Jury:

Here are two principal questions for you to decide:

(1) Was Berry permanently and totally disabled by a shell explosion and by shell shock to his nervous system?

(2) After such injuries and shock and before August 31, 1919—when his insurance expired—was it reasonably certain that his disabilities were permanent?

AS TO THE BURDEN OF PROOF. The burden of proof is on the plaintiff to prove that he was permanently and totally disabled before his insurance expired on August 31, 1919 and that it was then reasonably certain that his disabilities were permanent. By burden of proof is meant a preponderance of the evidence; to say it still differently the scales must tip in Berry's favor on these two questions. This does not necessarily mean that he must produce more or even as many witnesses as the

Charge.

Government, but it means after considering all the direct evidence, all the probabilities, and all the inferences, that you are more inclined to believe that he was permanently and totally disabled before his insurance expired and that it was then reasonably certain that his disabilities were permanent. The way you are more inclined to believe is the true test and the scales always tip according to that belief without regard to the number of witnesses on a side. If the scales just balance, or tip in the Government's favor, then Berry has failed to prove his case as the law requires and he cannot recover his insurance.

AS TO THE CREDIBILITY OF THE WITNESSES
AND THE WEIGHT TO BE GIVEN TO THEIR TESTI-

MONY. The law is you are not bound to give the same weight, or the same credit, or have the same faith in the testimony of each witness, but you should give their testimony just such weight, just such credit and have just such faith in it as you think it is fairly entitled to receive. Consider their appearance while testifying—their candor or lack of candor—their feelings or bias, if any—their interest in the result of the trial, if any—their means of information and the reasonableness of the testimony which they give and believe as much or as little as you think you ought to. You may believe it all—not believe any of it—believe a part and disbelieve the other part—just as you think you ought to.

The true legal test of the Government's liability to pay the insurance is that Berry must have been totally and permanently disabled before his insurance expired on August 31, 1919, and that it was then reasonably certain that such disabilities were permanent—that he would remain the same or grow worse instead of getting well enough to work continuously at a substantially gainful occupation. The only use you can make of the evidence showing his condition after June 16, 1918—when he was injured—and August 31, 1919—when his insurance expired—is to

Charge.

enable you to decide what his condition was at and before these times. If his injuries and his shock made him permanently and totally disabled before midnight August 31, 1919—when his insurance expired—the Government must pay the insurance. If his injuries and his shock made him permanently and totally disabled after August 31, 1919—when his insurance had expired, or if his injuries and his shock made him only partially disabled or only temporarily disabled, the Government is not liable to pay the insurance.

A total disability is any physical or nervous injury which makes it impossible for a person to follow continuously a substantially gainful occupation at any kind of work for which he was competent or qualified, physically and mentally, or for which he could qualify himself by a reasonable amount of study and training. The word "total" as applied to "disability" does not necessarily mean incapacitated to do any work at all. The word "continuously" means with reasonable regularity. It does not preclude periods of disability which are ordinarily incident to activities of persons in generally sound health, for nearly all persons are at times temporarily incapacitated by injuries, or poor health, from carrying on their occupations. If Berry was able to follow a gainful occupation only spasmodically, with frequent interruptions, due to his injuries, and his shock, he was totally disabled. A disability is permanent when it is of such a nature that it is reasonably certain it will continue throughout a person's lifetime.

If you decide that Berry's injuries and shock made it impossible for him to work continuously at a substantially gainful occupation and that on or prior to midnight August 31, 1919—when his insurance expired—it was reasonably certain that his disabilities were permanent—that he would remain the same or grow worse instead of getting well enough to work continuously at a substantially gainful occupation, then he is entitled to his insurance and your verdict will be that the Government is liable. If you

Charge.

do not decide both of these questions in his favor, or if his disabilities are partial instead of total, or temporary instead of permanent, then he is not entitled to his insurance and your verdict will be that the Government is not liable.

AS TO THE AMOUNT OF YOUR VERDICT. If your verdict is for Berry, he is entitled to the insurance payments of \$57.50 a month from midnight June 16, 1918, to and including May 31, 1939, being 252 months, amounting to \$14,490.00.
(12:28)

The Court: Now, Mr. Barber, you want an exception. We will attend to that in my room.

Mr. Curtin: I am satisfied with the Charge, Your Honor.

The Court: All right.

(In Chambers—12:30 p.m.)

Mr. Barber: The plaintiff excepts to the Court's refusal to submit that Berry could be permanently and totally disabled by the loss of his left leg without a nervous shock, or without the injury to his right hip, the injury to his right elbow, the right side of the face in front of the ear, and back of the right shoulder.

(The jury are taken to dinner at this time, and then return to consider the case.)

(In courtroom at 3:15 p.m.)

The Court: Well, Mr. Foreman, what do you say?

Foreman: If it please Your Honor, we have got into a little difficulty. There seems to be some of the

Additional charge.

gentlemen would like to be instructed a little more thoroughly as to what constitutes total disability.

Whether if a man was able to work half time, or 65% of the time, or 75% of the time, whether you could count that total disability or not?

The Court: I am not allowed to tell you so specifically as that, Gentlemen. That is your job.

Foreman: Perhaps I can put it a little different. We will say that a man is able to work part of the time and earn a little money but not perhaps enough to earn a livelihood?

The Court: That is a good question.

Mr. Curtin: Wouldn't that Lumbra case cover that, Judge? The Supreme Court decision?

Mr. Gibson: The Supreme Court and the Veterans Bureau have both defined that and I think the Court has it in his Charge there.

The Court: Well the best I can do and the only thing I am allowed to do is to repeat in substance, perhaps in a little more detail, what I told you. A total disability is any physical or nervous injury which makes it impossible for a person to follow continuously a substantially gainful occupation at any kind of work for which he was competent or qualified, physically and mentally, or for which he could qualify himself by a reasonable amount of study and training.

Now you notice! I say to follow continuously a substantially gainful occupation. Now I say "what is continuously"? The word continuously means with reasonable regularity. To follow continuously a substantially gainful occupation; continuously means with reasonable regularity. Now what is "reasonable regularity" is for you to decide—instead of for me. Now

Additional charge.

the words "reasonable regularity" do not preclude periods of disability which are ordinarily incident to activities of persons in generally sound health, for nearly all persons are at times temporarily incapacitated by injuries or poor health from carrying on their occupations. Now keep in mind that "continuously" does not preclude those interruptions that most persons have by illness or injuries. If Berry was able to follow a gainful occupation only spasmodically, with frequent interruptions due to his injuries and the shock, he was continuously disabled. Now it is for you to decide how often he should be interrupted to come within that definition. Just notice—"with frequent interruptions". Now how often should he be unable to carry on his occupation to come within the term "frequent interruptions". Now that is for you to decide. A disability is permanent when it is of such a nature that it is reasonably certain it will continue throughout a person's lifetime. Now I am not allowed to go any farther than that, Gentlemen.

"A substantially gainful occupation"—you don't have any trouble about that term, do you? Now I will repeat it here: If you decide that Berry's injuries and shock made it impossible for him to work continuously at a substantially gainful occupation, and that on or prior to midnight August 31, 1919—when his insurance expired—it was reasonably certain that his disabilities were permanent—that he would remain the same or grow worse instead of getting well enough to work continuously at a substantially gainful occupation, then he is entitled to his insurance and your verdict will be that the Government is liable. If you do not decide both these questions in his favor, or if his disabilities are partial instead of total, or temporary instead of per-

Additional charge.

manent, then he is not entitled to his insurance and your verdict will be that the Government is not liable.

Now I think that is all I should say to you, Gentlemen. If the law allowed the Judge to do as your question indicates, Mr. Foreman—half—often—or less frequent—well, it would resolve itself into a question of law instead of a question of fact, and be for the Judge to decide instead of the jury to decide. Now have I helped you any, Gentlemen?

Foreman: I am afraid not very much.

Mr. Curtin: If Your Honor please, when that Lumbra case was decided, didn't they define that question when they said Lumbra worked approximately five years in the past ten years and that was sufficient work to disallow his insurance?

Mr. Gibson: No, the facts are entirely different in that case, and the work record was entirely different in that case.

The Court: What would you gentlemen say if I have Miss Weller just make a copy of this paragraph here containing those definitions and let the jurymen have it? Would that help you?

Foreman: I think it might.

The Court: I think it might. I am not allowed to do that though without they agree to it.

Mr. Curtin: That is agreeable to me.

Mr. Gibson: All right—we agree.

The Court: We will send you four or five copies in a few minutes.

(The jury retires at 3:27.)

(At 4 p.m. the jury returns to courtroom.)

Verdict—Certificate.

The Clerk: Mr. Foreman, has the jury agreed upon a verdict?

Foreman: We have.

The Clerk: "*Verdict for plaintiff.*"

In this cause the jury on their oath say that the defendant is liable in manner and form as the plaintiff in his declaration hath alleged and find for the plaintiff to recover from the defendant \$57.50 a month from June 16, 1918 to May 31, 1939, inclusive, being 252 months, amounting to \$14,940.00.

H. C. WORMWOOD,
Foreman."

Is that the verdict of the jury, Mr. Foreman?

Foreman: It is.

The Clerk: So say you all, Gentlemen?

Jurors: We do.

The Court: You may enter judgment on the verdict.

CERTIFICATE.

I, Katharine A. Gardner, stenographic reporter, hereby certify that the above and foregoing pages numbered from 1 to 308, inclusive, contain a verbatim transcript of my verbatim stenographic notes taken of the evidence and proceedings in re *Civil Action No. 1183 Leroy A. Berry v. United States of America*, except where same was ordered "off the record", tried at Special April Term, 1939 at Montpelier, before the Honorable Harland B. Howe and jury.

KATHARINE A. GARDNER,
Official Reporter.

Dated:
Burlington, Vermont,
October 21, 1939.

PLAINTIFF'S EXHIBITS

Plaintiff's Exhibit 1-a

SCHEME OF REPORTS OF PHYSICAL EXAMINATIONS

Place, St. Johnsbury, Vt.

Date, July 16, 1920.

1. Claimant's name, Leroy A. Berry (C 114614).
2. Service organization and rank, Pvt., Co. E, 103 Inf.,
26 Div.
3. Present address, St. Johnsbury, Vermont.
4. Age, 25. Color, W. Previous occupation, Farmer.
5. Brief military history of claimant's disability: Toul
Sector, June 6, 1918, hit below knee by high explosive. Ampu-
tation of left leg 7" below knee at E. H. No. 6. April 28, 1920,
operated on stump at Parker Hill, Boston.
6. Present complaint: Artificial limb not satisfactory on
account of shrinking of amputated stump, size and weight of leg.
7. Physical examination: Stump of left leg all healed, and
not painful on pressure. Stump is 7" below knee. Examination
of eyes, ears, nose and throat normal. Chest and heart sounds
normal. Urine sp. gr. 1014, albumin and sugar negative.
8. Diagnosis: Amputation on stump.
9. Prognosis: Excellent.
10. Is claimant able to resume former occupation? No.
11. Do you advise it? No.
12. Is claimant bedridden? No.
13. Is the claimant able to travel? Yes.
14. Do you advise hospital care? No.
15. Will claimant accept hospital care? Yes.
16. Is there a reasonable presumption that the applicant
has a disability due or traceable to his military service? Yes.
17. What is the degree of his vocational handicap result-
ing from the disability? Major.

Plaintiff's Exhibits.

18. Does his physical and mental condition render training feasible? Yes.

Trans. to Boston for fitting artificial leg.

Signature, JOHN P. TIERNEY.

Grade, Act. Asst. Surgeon.

Plaintiff's Exhibit 1-b

DR. A. C. KINNEY
HARDWICK, VT.

Aug. 10, 1933.

Veterans' Administration,
Burlington, Vt.

Dear Sirs:

This is to certify that I have been treating Leroy A. Berry for an abscess on the stump of his amputated left leg where it is irritated by his artificial leg. This is the third abscess that he has had since the first of July in this location, and I am afraid of bone involvement. I should advise hospitalization.

Yours very truly,

A. C. KINNEY.

Plaintiff's Exhibit 1-c**REPORT OF NEUROPSYCHIATRIC EXAMINATION**

1. Claimant's name: Berry, Leroy A. C-No. 114-614.
2. Service, rank, and organization: Pr., Co. E, 103rd Inf. S. M. W. D., Married.

Plaintiff's Exhibits.

3. Address: Now of Hardwick, Vt.
4. Occupation: Salesman.
5. Date of military induction: July 1, 1917.
6. Date of military discharge: Jan. 2, 1919.
7. Family and personal history: Father and mother dead.

Father killed in accident, mother died of childbirth. Two brothers, both well. One sister feeble-minded since age of two. Had pneumonia eight months before enlisting, double, flu in France, left leg amputated in France.

8. Chief present complaint and history of present illness: Scars and pain right hip and thigh, also in right arm, foreign body still there. Frequent pains along ulnar and radius. Similar condition in thigh, shooting pains downward. More pain in right limb than in left (where lower leg was amputated).

9. Neurological examination: Neuralgic arm and leg. Restless and for this reason had to give up his work in garage. Often feels exhausted. Excitability, pulse 90. Loses time now and then as result of injuries. No incoordination, deep reflexes and cutaneous senses normal. Pupils react normally. No Romberg, Babinski or Dejerine signs present. . . .

11. Mental examination: Gen. deportment, apparently very good. Impulses normal but complains of much fatigue, depression and headache while at work. Has to go home and lie down. Emotional; not anxious or fearful, he says, (his wife tells different) but easily upset. Orientation, normal. Memory not so good. Very forgetful, absent-minded and often cannot remember words.

Followed the nine grades at school. Obtained school certificate. Good grasp. Apparently a "clean" fellow. Conceals fears. Thunder in the night almost drives him mad. Carefully avoids all places where there is much noise, especially celebrations as on 4th of July when explosives, torpedoes, fire-crackers and the likes have a decidedly bad effect upon him.

Plaintiff's Exhibits.

Believes, perhaps rightly, his allowance considering what he has been through should be more than it is. Claims he has the lowest rating for his infirmity.

The war has changed him physically and somewhat mentally.

12. Physical diagnosis: Left lower leg amputated. Blood pressure, systolic, 120 at 35 years of age. Neuralgic pains in wound areas.

13. N. P. diagnosis: Neurasthenia (moderate). Excitability easily traced to severe nervous shock in back years. Shell shock.

14. Treatment recommended: Rest as much as possible. New artificial limb.

15. Is claimant bedridden? No.

16. Do you advise hospitalization for diagnosis? No.

17. Will claimant accept hospital care? No.

18. In your opinion, is it advisable that claimant resume his former occupation? Yes.

19. Is he competent? Yes.

21. Can he travel without an attendant? Yes.

22. Did you examine the man yourself on this date? Yes.

23. Place: My office, St. Johnsbury, Vt. Date: Sept. 27, 1930.

Signature of examining physician: Official title, N. P.

JOHN A. DROUIN, M. D.

Plaintiff's Exhibit 1-d

(Examined on 2507 dated Feb. 26/24 for Permanent Rating)

REPORT OF PHYSICAL EXAMINATION

C. No. 114 614.

1. Claimant's name, Berry, Leroy A. M.

2. Service, rank, and organization, Pvt., Co. E, 103rd Inf.

Plaintiff's Exhibits.

3. Present address, N. Railroad St., St. Johnsbury, Vermont.

4. Age, 28.

5. Color, White.

6. Principal prewar civil occupation, Photographer.

7. Date of induction, July 1, 1917.

8. Date of discharge, Jan. 2, 1919.

9. Brief history of claimant's disability during service: Wounded in Toul Sector June 16, 1918 by H. E. in Hosp. No. 1, for about 5 wks. Trans. to B. H. No. 66 for 6 wks. then sent home.

10. Present complaint: Amputation of left leg and shell wound of right hip. Weakness and cramps and pain in the right hip.

11. Physical examination: Examination for permanent rating by board of three made on March 11, 1924. Height: 65". Weight: 155 lbs. Color of hair: brown. Color of eyes: blue. Complexion: light. Identification: Teeth—in fair repair. Special senses—negative. Chest—exp. 34, insp. 37. Heart—normal. Lungs—negative. Abdomen—negative. Extremities—amputated left leg, the upper third. Stump somewhat irritated. See report of Dr. J. B. Wheeler hereto attached. Shell wound of right hip. Scar adherent. N. P. condition—see report of Dr. Child, hereto attached.

Board of three recommends permanent partial disability of 65% for loss of left leg and G. S. W. right hip.

JOHN B. WHEELER, M.D.

H. T. CHILD, M.D.

GEO. G. HALL, M.D.

12. Diagnosis: (86) Amputation stump left leg; G.S.W. right hip. (211); neuritis following due to G.S.W. (2067) G.S.W. right thigh; neuroma (847).

13. Prognosis: Guarded.

Plaintiff's Exhibits.

14. Is claimant able to resume his prewar occupation, in your opinion? In part only. If not, state why, Tender scars.
15. Is claimant bedridden? No.
16. Is claimant able to travel? Yes.
17. Do you advise hospital care? No.
18. Will claimant accept hospital care? Yes, if necessary.
19. Is an attendant necessary? No.
20. Is his physical and mental condition such that vocational training is feasible? Yes.
21. Did you examine the man yourself on this date? Yes.
22. Place, Burlington, Vt. Date, March 11, 1924. Name, George G. Hall, M.D. Title, Sub-Dist. Med. Off.

Medical and industrial history since military discharge: Any acute intercurrent illness? Treated by what physicians? When? In what hospitals? When? Where? Employed continuously? Where, when? Are you employed at present? If not, why? Discharged Jan. 2, 1919. May 1920 operation for abscesses on leg at Parker Hill Hosp., Boston, Mass. Any additional remarks: Remained 10 days. Treated by Dr. Tierney, St. Johnsbury. Jan. 1919-May 1919 unemployed on account of disability. May 1919-April 16, 1923 Vocational Training as auto mechanic. April 15, 1923-Oct. 1923 St. Johnsbury Garage, St. Johnsbury, Vt. Oct. 1923-Nov. 1923 employed by E. & T. Fairbanks Co., St. Johnsbury, Vt. Nov. 1923—Present working for self, repairing automobiles.

Plaintiff's Exhibit 1-e

REPORT OF PHYSICAL EXAMINATION

N. P. ORTHOP

C-No. 114 614.

1. Claimant's name, Berry, Leroy A. Address, Sheffield, Vermont.

Plaintiff's Exhibits:

2. Examined, R. O. No. 5, Vet. Adm., Burlington, Vt., 12-5-32.

3. Age, 37. Color, W. Birthplace, St. Johnsbury, Vt. Color of eyes, blue. Color of hair, l. brown.

4. Height, 65 inches. Weight, 166. Highest weight in past year, ?.

6. Rank and organization, Pvt., Co. E, 103rd Inf. Date of induction, 7-1-1917; of discharge, 1-2-1919.

8. Brief medical and industrial history: No medical attention since last examined. For the past two years has done practically no work except some selling from house to house—Home products, flavoring extracts, etc.

9. Present complaint: Amputation left leg. Lameness right hip—both legs have been giving him trouble—has had to use crutches for week at a time.

10. Temperature, 98.4. Respiratory rate: sitting 24. Pulse rate: sitting 94. Any arrhythmia of pulse? No. (If so, describe, exercise not performed.) Systolic 114, diastolic 66.

11. General appearance, good; nutrition, good; muscular development, fair; carriage, normal; posture, fair; gait, uses crutches.

12. Eyes: External structures, each eye, normal. Vision (Snellen chart): Uncorrected R-20/20. L-20/20.

13. Ears. Auditory canals: Normal? Yes.

14. Nose, throat, sinuses: Normal? Yes.

15. Cardio-vascular system: Normal? Yes.

C-No. 114614.

16. Respiratory system: Normal? Yes.

17. Digestive system: Are mouth; teeth, gums, stomach, intestines, liver, gall bladder, and rectum normal? Yes. Appendectomy scar in r. l. q.

18. Spleen; lymphatic glands: Normal? Yes.

Plaintiff's Exhibits.

19. Nervous system: Are brain, spinal cord, peripheral nerves, and mentality normal? Yes.

20. Genito-urinary system: Kidneys, bladder, prostate, penis, testicles normal? Yes.

C-No. 114614.

21. Rheumatism: Articular or muscular? None.

22. Hernia: Inguinal, femoral, ventral, umbilical? No.

23. Hydrocele? No. Varicocele? No.

24. Varicose veins? No.

25. Pes planus (flat or weak foot)? No.

26. Skin (Location, type, extent of lesions): None.

27. Residuals of gunshot wounds or other injuries: Amputated left leg, upper third. Right extr.: Deep scar irregular on the inside of thigh in upper portion; another scar on the lateral side of the pelvis; several inches below another irregular scar on the lateral aspect of thigh. Use of the right extremity causes severe pain; he has to use crutches.

28. Evidence of effects of past or present vicious habits: None.

29. Laboratory examinations: Urine: Al. neg.; Sug. neg.

C-No. 114614.

30. Additional: Board of three find: G.S.W. multiple with amputation of left leg in the upper third right, sciatic irritation, recommend permanent rating.

R. L. MAYNARD, M.D.,

Orthopedic D. E.

HIRAM E. UPTON, M.D.,

N. P. Examiner.

JOS. BOCH, M.D.,

Medical Officer.

31. Diagnoses: Amputated, left leg. Scars, severe, right thigh, with impaired function.

Plaintiff's Exhibits.

32. Is the claimant bedridden? No. Is he able to travel? Yes. Does he need hospitalization? No. Is an attendant necessary for travel? No. Is the claimant mentally competent or incompetent? Comp. Do you consider a guardian necessary? No. Did you examine him yourself? Yes. Date, 12/5/32.

Name of examiner, Jos. BOCH. Title, M. O.

33. Statement by Claimant. My answers to Question 9 have been read to me, and I hereby certify that the complaints recorded are all that I am suffering from, to the best of my knowledge and belief.

Signature of claimant, LEROY A. BERRY.

Plaintiff's Exhibit 1-f

REPORT OF PHYSICAL EXAMINATION

C. No. 114. 614.

1. Claimant's name, Berry, LeRoy A., M.
2. Service, rank, and organization, Pvt., Co. E, 103rd Inf.
3. Present address, 38 Clarks Ave., St. Johnsbury, Vermont.
4. Age, 28.
5. Color, White.
6. Principal prewar civil occupation, Photographer.
7. Date of induction, July 1, 1917.
8. Date of discharge, Jan. 2, 1919.
9. Brief history of claimant's disability during service: Claimant states that he was wounded in Toule Sector June 16, 1918, by high explosive shell. Was in Hosp. No. 1 for about 5 wks. Trans. B. H. No. 66 for 6 wks. Then was sent home.

Plaintiff's Exhibits.

10. Present complaint: Gets cramps and stiffness about right hip with dull ache in damp weather. Wears artificial left leg for amputation below knee. Claims stump of amputation at times becomes sore and painful. Never any discharge from stump nor knee swelling. "Seems as if bone ached."

11. Physical examination: Height, 65½". Color of hair, Lt. Brown. Weight, 154 lbs. Color of eyes, Blue. Complexion, Fair-ruddy. Identification: (a) Amputation stump left leg, 6½" below knee joint. (b) 2" x 1" and 3" x 1½" scar outer side right hip. (c) 4" x 2" scar inner side, upper third right thigh.

(M-2-eeb) Examination by Dr. Taylor: Individual of medium height, good physique, healthy appearance, good muscle development. Walks with limp in left leg. Head and special senses show nothing abnormal to rough tests. Chest, normal in contour. Expansion good. Lungs, show no abnormal breath sounds. No moisture. Heart, normal in size and position. No murmurs. Abdomen, regular in shape. No masses nor tenderness. No hernia, hemorrhoids, nor varicocele. Extremities, amputation stump left leg, 6½ inches below knee. Stump well shrunk and shows no evidence of irritation. Scars about right hip and thigh as noted above. These scars non-adherent and do not limit motion. Motion of right hip normal. Extremities, otherwise normal. Joints free and moveable. Skin is clear.

Patient is desirous of being furnished with a slip socket leg in place of a stationary socket which he is now wearing, as he believes there will be less pain in stump with such a device. It is recommended that patient be called to Boston with a view to supplying him with such an artificial limb.

(Signed) H. F. TAYLOR, M.D.

12. Diagnosis: (2067) G. S. W. left leg with amputation, G. S. W. right hip (not listed).

13. Prognosis: Guarded.

Plaintiff's Exhibits.

14. Is claimant able to resume his prewar occupation, in your opinion? In part. If not, state why. Because of G. S. W. and amputation left leg.

15. Is claimant bedridden? No.

16. Is claimant able to travel? Yes.

17. Do you advise hospital care? No.

18. Will claimant accept hospital care? Yes.

19. Is an attendant necessary? No.

20. Is his physical and mental condition such that vocational training is feasible? Yes.

21. Did you examine the man yourself on this date? No.

22. Place, Burlington, Vermont. Date, April 2, 1923.

Name, Howard T. Child, M.D. Title, Sub-Dist. Med. Officer.

Medical and industrial history since military discharge: Any acute intercurrent illness? Treated by what physicians? When? In what hospitals? When? Where? Employed continuously? Where, when? Are you employed at present? If not, why? Discharged Jan. 2, 1919.

Any additional remarks: Claimant states that about the 1st of May, 1920 was operated on for abscesses on leg at Parker Hill Hosp. Boston, Mass. Remained ten days. Claimant states that he was treated by the following physicians. Dr. Tierney, St. Johnsbury, Vermont (once a gov't pat. and last time private pat.)

Has been employed as follows since discharge: Jan. 2, 1919-May 1919, unemployed on account of disability. May 1919-present time, Federal Board Trainee, Part time as photographer in New York City. Also in Illinois College of Photography.

During summer of 1920, was unable to do much work.

*Plaintiff's Exhibits.***Plaintiff's Exhibit 1-g**

(Form 2507 dated April—1923)

REPORT OF PHYSICAL EXAMINATION

C. No. 114 614.

1. Claimant's name, Berry, Leroy A., M.
2. Service, rank, and organization, Pvt., Co. E, 103rd Inf.
3. Present address, No. Railroad St., St. Johnsbury, Vt.
4. Age, 28.
5. Color, White.
6. Principal prewar civil occupation, Photographer.
7. Date of induction, July 1, 1917.
8. Date of discharge, Jan. 2, 1919.
9. Brief history of claimant's disability during service:
Wounded in Toul Sector June 16, 1918 by H. E. In hospital No. 1 for about 5 wks. Trans. to B. H. No. 66 for six weeks, then sent home.
10. Present complaint: Amputation left leg.
11. Physical examination: Height, 5' 5". Weight, 150 pounds. Identification: (M:glm.) Chest measurements, 34/36/37. Heart—normal in size and position, no murmurs heard. Lungs—no rales, no adventitious sounds. Abdomen and G. U. negative. Extremities—G. S. W. right hip 2" long and 1" wide, an adherent scar which results in considerable muscular cramps at times. 3" below on the outer side of the right leg is a scar 3" long and adherent. On the incision side of the right middle third of the thigh is a scar 2" long and adherent and tender. Left leg shows amputation below the knee, well healed, non-tender. Skin on the side of the leg, however, is reddened and tender, due to pressure of socket.

Note: This man has been written to report to Boston for proper measurements for a new socket for artificial limb and it is expected by this time he has reported there.

Plaintiff's Exhibits.

12. Diagnosis: G. S. W. right hip; G. S. W. left leg with amputation left leg (below knee); G. S. W. right thigh (2067).

13. Prognosis: Guarded.

14. Is claimant able to resume his prewar occupation, in your opinion? In part only. If not, state why. Tender scars.

15. Is claimant bedridden? No.

16. Is claimant able to travel? Yes.

17. Do you advise hospital care? No.

18. Will claimant accept hospital care? Yes, if nec.

19. Is an attendant necessary? No.

20. Is his physical and mental condition such that vocational training is feasible? Yes.

21. Did you examine the man yourself on this date? Yes.

22. Place, Burlington, Vermont. Date, Oct. 15, 1923.

Name, Howard T. Child, M.D. Title, S. D. M. Officer.

Medical and industrial history since military discharge: Any acute intercurrent illness? Treated by what physicians? When? In what hospitals? When? Where? Employed continuously? Where, when? Are you employed at present? If not, why? Discharged Jan. 2, 1919.

Any additional remarks: May, 1920 operation for abscesses on leg at Parker Hill Hosp., Boston, Mass. Remained ten days. Dr. Tierney, St. Johnsbury, Vt.

Jan. 2, 1919-May, 1919—unemployed on account of disability. May, 1919-April 15, 1923—Vocational Training as auto mechanic. April 15, 1923-Oct. 1923—St. Johnsbury Garage, St. Johnsbury, Vt. Oct. 1923—E. & T. Fairbanks Co., St. Johnsbury, Vt.

*Plaintiff's Exhibits.***Plaintiff's Exhibit 1-h**

UNITED STATES VETERANS BUREAU

Burlington, Vt.

March 13th, 1924

Dr. George G. Hall
 Sub-District Medical Officer,
 Union Station, City.

Dear Doctor:

On March 11th I examined Leroy A. Berry. He shows an amputation stump of the left leg at the junction of the upper and middle thirds of the tibia. The stump is in good condition. He has two scars from a G. S. W. on the outside of the right hip (wound of entrance) and a scar of the wound of exit over the origin of the adductor muscles. The latter troubles him by chafing in hot weather and he suffers a good deal from cramps in the right thigh. These symptoms, together with the loss of his left leg seem to me to entitle him to a permanent disability rating of 65%.

Respectfully,

JOHN B. WHEELER.

Plaintiff's Exhibit 1-i

REPORT OF NEUROPSYCHIATRIC EXAMINATION

C-No. 114 614.

1. Claimant's name; Berry, Leroy A.
2. Service rank and organization: Pvt., Co. E, 103rd Inf.
- M. Age, 28.
3. Address: No. Railroad St., St. Johnsbury, Vt.
4. Occupation: Photographer.
5. Date of induction: July 1, 1917.
6. Date of discharge: Jan. 2, 1919.

Plaintiff's Exhibits.

7. Family and personal history: Born at St. Johnsbury, Vt., and went to school at Sheffield, Vt., through nine grades and graduated. Then worked on the farm and in a saw mill. Took up photography, but had to get out doors and before entering service was driving a team for a living. While in service he received a G. S. W. in the left leg, right hip and right elbow. The left leg was amputated at its middle third below the knee, and developed after this a small neuroma at the end of stump and to the left side which was removed in May 1920. This area was very tender for three months after operation and on this examination shows considerable chafing and redness, but no tenderness.

8. Chief present complaint and history of present illness: The patient complains of cramps in this stump just before a storm or in damp weather.

9. Physical diagnoses: Amputation left leg. G. S. W. right hip.

10. Neurological examination: Pupils react to light and accommodation readily. No Von Graefe, no Stellwag. No evidence of thyroid enlargement. Knee jerks active and equal. Pain and temperature sense acute. No Romberg. No Ankle Clonus. No Babinski.

12. Mental examination: Claimant is bright and active. Greeted examiner in a hearty manner. Showed no delusions, no depressions or elations, no hallucinations. Stream of thought was direct and to the point. Mental tests were accurately done and general school knowledge was also good. No mental deterioration found. This man has in the past suffered from a nervousness at sight of amputation but has recovered, although there is some neuritis at point of operation.

13. N. P. diagnosis: Neuritis following neuroma. Scar tissue, left leg.

14. Prognosis: Favorable.

15. Treatment recommended: None.

Plaintiff's Exhibits.

16. Is claimant bedridden? No.
17. Do you advise hospital care? No.
18. Will claimant accept hospital care? Yes.
19. Has claimant VOCATIONAL HANDICAP or an OCCUPATIONAL LOSS? Yes.
20. In your opinion, is it advisable that claimant resume his former occupation? In part, on account of difficulty in standing any length of time.
21. Is training feasible? Yes.
22. Is he COMPETENT? Yes.
24. Remarks and recommendations: Believe this case should be watched that other neuroma develop.
25. Final disposition of cases: Examined and returned home.
26. Did you examine the man yourself on this date? Yes.
27. Place: Burlington, Vermont. Date: March 11, 1924.
Name, Howard T. Child, M.D. Title, N. P. Examiner.

Plaintiff's Exhibit 1-j**UNITED STATES VETERANS BUREAU****BURLINGTON, VT.**289 College St.,
Jan. 23, 1930.

Dr. George G. Hall,
Regional Medical Officer,
Burlington Regional Office,
U. S. Veterans Bureau,
Burlington, Vt.

Dear Doctor:

Examination of Leroy A. Berry, Lyndonville, Vt., Claim
No. 114 614 shows as follows:

Plaintiff's Exhibits.

The left leg has been amputated in the upper third at a point $6\frac{1}{2}$ " below the knee. The stump is in fair condition although there are some small areas of skin irritation and callous from pressure. The scar is healthy. The ends of the tibia and fibula are very plainly felt as they are covered over with a scanty muscle flap but are not sensitive and there is no appearance of bone disease. This extremity shows considerable atrophy, it being $2\frac{1}{2}$ " smaller in circumference close to the body, 3" smaller just above the knee, and 2" smaller just below the knee. This atrophy is partly from dis-use and partly from pressure on it from the artificial limb. There is no evidence of nerve or vessel injury in this extremity. Motions of the joints are normal. The right thigh and hip areas show three scars. One scar lies on the inner surface of the thigh. It starts about 1' down from the groin and extends straight down the thigh for 4". It is 2" wide. There is some loss of underlying soft tissue and the scar is depressed and adherent. There is no muscle hernia. The second scar starts at a point about $\frac{1}{2}$ " in front of the great trochanter and level with it and extends down the outer surface of the thigh for 3". It is $1\frac{1}{4}$ " wide. The third scar extends upward from just above the great trochanter on to the side wall of the pelvis and it is 3" long and 1" wide. Both of these scars are slightly depressed and adherent and show some loss of underlying soft tissue, but there is no nerve, vessel, or bone injury. Function of the right hip joint and of the other joints of this extremity is normal. There is a right rectus scar of operation where the appendix was removed which is still healthy, strong, and giving no trouble.

Diagnosis: G. S. W., multiple with amputation of left leg in upper third.

In my opinion this case should be rated as permanent partial and the disability classed as severe. These injuries were severe. Maximum treatment has been received with the exception that this claimant is badly in need of a new artificial limb. The one

Plaintiff's Exhibits.

he is now wearing is worn in all places and the foot is broken, the joints are weak and the socket is split and broken and worn. He should be supplied with a new artificial limb and one of his old limbs should be repaired to act as a spare.

He tells me he has another limb at home which could be repaired more cheaply and easily than the one he is now wearing. I recommend that he be sent to Boston for making and fitting to him of a new artificial limb and to have the old one repaired. Hospital—Yes, if necessary for this work to be done; otherwise no. There is a decided occupational handicap because of the disabilities described.

Yours truly,

ROBERT L. MAYNARD, M.D.

Att. Orthopedic Specialist.

P. S. There are several small superficial scars on the right arm, shoulder, chest, and face. None of these are giving any trouble.

Plaintiff's Exhibit 1-k.

UNITED STATES VETERANS BUREAU

BURLINGTON, VT.

289 Collège St.,
August 16, 1930.

Dr. George G. Hall,
Regional Medical Officer,
U. S. Veterans Bureau,
Burlington Regional Office,
Burlington, Vt.

Dear Doctor:

In answer to your request relative to Leroy A. Berry, Claim No. 114 614, I would say it is possible that the gracilis or the ad-

Plaintiff's Exhibits.

ductor longus were affected by the wound on the inner aspect of the right thigh. The gluteus maximus and possibly the vastus externus were affected by the other two wounds. None of these muscles were badly affected the injury being considered very moderate.

Yours truly,

RQ2 J. MAYNARD, M.D.

Att. Orthopedic Specialist.

Plaintiff's Exhibit 1-1

VETERANS ADMINISTRATION

UNITED STATES VETERANS BUREAU

Burlington, Vt.

289 College St.,
April 19, 1932.

Dr. George G. Hall,
Regional Medical Officer,
Burlington Regional Office,
U. S. Veterans Bureau,
Burlington, Vt.

Dear Doctor:

Examination of Leroy A. Berry, Hardwick, Vt., Claim No. 114 614 shows as follows:

The findings are much the same as at the time of his last examination January 23, 1930. The left leg has been amputated in its upper third $6\frac{1}{2}$ " below the knee. The stump is in fair condition but there are several areas of skin irritation and calluses from the rubbing of the socket. The scar itself is healthy. The ends of the tibia and fibula are easily felt and are rather super-

Plaintiff's Exhibits.

ficial as they are covered by a very scanty muscle flap but they are not sensitive and show no evidence of bone disease. There is a good deal of atrophy in this extremity, it being $3\frac{1}{2}$ " smaller in circumference in the mid thigh and $2\frac{1}{2}$ " smaller close to the body. Just above the knee it is 2" smaller and just below the knee $1\frac{1}{2}$ " smaller and at the end of the stump 5" smaller than the corresponding points on the well side. The knee itself is $\frac{1}{2}$ " smaller. This atrophy is partially from disuse but largely from pressure from the artificial limb. There is no evidence of nerve or vessel injury and motions of the joints in this extremity are normal. The right thigh and hip areas show three scars. One lies on the inner surface of the thigh starting 1" below the groin and extending straight downward for 4". It is 2" wide and shows some loss of underlying soft tissue with depression and adherence of the scar to the soft tissue. There is no muscle hernia. The second scar starts about $\frac{1}{2}$ " in front of the great trochanter and extends down the outer surface of the thigh. It is 3" long and $1\frac{1}{4}$ " wide. The third scar extends upward from just above the great trochanter on to the side wall of the pelvis measuring 3" long and 1" wide. These latter two scars are slightly depressed and adherent and show some loss of underlying soft tissue. There is no evidence of nerve, vessel or bone injury. Function of the right hip joint and of the other joints of this extremity is normal. There are several small scars on the right arm, shoulder, chest and face none of which are giving trouble. The abdomen shows a right rectus scar of operation made for removing the appendix. It is strong and gives no trouble. No other trouble was noted.

Diagnosis: G. S. W. multiple with amputation of left leg in upper third.

In my opinion this case should be rated as permanent partial and the disability classed as severe. The injuries were severe. The muscles affected in the right lower extremity were probably the gracilis or the adductor longus, gluteus maximus and possibly

Plaintiff's Exhibits.

the vastus externus. Maximum treatment has been received, with the exception that this claimant's artificial limb is now in poor condition. The ankle joint does not work well, the knee joint bushing clicks noisily and the elastic waist belt is useless. I therefore recommend that this claimant be furnished with a new artificial limb. He would like one of the Duralumium limbs and I believe it would be alright for him to have that kind and therefore recommend it. The old limb should also be repaired to be used as a spare. For this work he should be sent to Boston and he also requests that he be sent to the United Limb and Brace Co., who furnished him his first limb—the most satisfactory one he has had. Hospital—No: There is a severe occupational handicap because of the conditions described above which render hard manual labor out of the question.

Yours truly,

ROBERT L. MAYNARD, M.D.,

Att. Orthopedic Specialist.

Plaintiff's Exhibit 1-m

VETERANS ADMINISTRATION

BURLINGTON, VT.

289 College St.

December 5, 1932.

Dr. George G. Hall,
Chief Medical Officer,
Veterans Administration,
Burlington, Vermont.

Dear Doctor:

Examination of Leroy A. Berry, Hardwick, Vt., Claim
No. 114 614 shows as follows:

Plaintiff's Exhibits.

The stump of the left leg is in a little better condition now than it was last April. The skin irritation is less but the calluses are still present from rubbing of the socket. This leg was amputated in the upper third $6\frac{1}{2}$ " below the knee. While the operative scar is healthy, the ends of the tibia and fibula are quite superficial and easily felt because of the scanty muscle flap which covers them over. The bone ends are not sensitive and show no evidence of disease. This extremity shows much atrophy. It is $3\frac{1}{2}$ " smaller in circumference in the mid thigh and $2\frac{1}{2}$ " smaller close to the body. Just above the knee it is 2" smaller; just below the knee, $1\frac{1}{2}$ " smaller; at the end of the stump 5" smaller than the right lower extremity at the same levels. The knee itself is $\frac{1}{2}$ " smaller. The atrophy is partly from disuse and partly from pressure from the artificial limb. There is no evidence of nerve or vessel injury and motions of the joints in this extremity are normal. There are three scars on the right thigh and hip area. One starts on the inner surface of the thigh, at a point 1" below the groin, and extends downward for 4". It is 2" wide and shows some loss of underlying soft tissue and is depressed and adherent. The second starts $\frac{1}{2}$ " in front of the great trochanter and extends downward on the outer surface for 3", and measures $1\frac{1}{4}$ " wide. The third scar extends upward from just above the great trochanter on to the side wall of the pelvis. It measures 3" long and 1" wide. These latter two scars are slightly depressed and adherent and show some loss of underlying soft tissue. There is no evidence of bone or vessel injury in this extremity. There is a suggestion of sciatic irritation on this side with slight points of tenderness along the superficial points of the nerve. The right hip joint and the other joints of this extremity appear normal and the spine and sacro-iliac joints show no trouble. There are several small scars on the right arm, shoulder, chest and face, none of which are giving trouble. There is a right rectus scar of operation which was made when the appendix was removed.

Plaintiff's Exhibits.

It is giving no trouble and the abdomen showed no pathology. No other trouble was noted.

Diagnosis: G. S. W. multiple with amputation of the left leg in the upper third; right sciatic irritation.

In my opinion this case should be rated as permanent partial and the disability classed as severe. Maximum treatment has been received except that claimant is in need of his new artificial limb, and should have the old one repaired. I understand he will receive this limb soon. Should the use of the new limb not cause a subsidence of the sciatic irritation on the right side by relieving strain on that part, the sciatic irritation should be further investigated and x-rays taken of the hip joint and lower back, but that is not necessary at present. These wounds were severe. The muscles affected in the right lower extremity are probably the gracilis and the adductor longus, gluteus maximus, and possibly the vastus externus. There is a severe occupational handicap because claimant is able to do no work which requires standing and no heavy work because by so doing both lower extremities are made much worse.

Yours truly,

ROBERT L. MAYNARD, M.D.,

Att. Orthopedic Specialist.

Plaintiff's Exhibit 3

UNITED STATES OF AMERICA

WAR DEPARTMENT

Washington, June 9, 1936.

I hereby certify that the documents attached pertaining to Leroy A. Berry, Army Serial Number 67,902, who was enlisted July 1, 1917; served overseas with Company B, 103rd Infantry

Plaintiff's Exhibits.

from September 25, 1917 to September 7, 1918, and was honorably discharged January 2, 1919 by reason of demobilization order from the War Department dated November 15, 1918, a private, are true photostatic copies of the reports of his physical examinations made at the time of his entrance into and of his discharge from the military service; report of the disability board; dental card; field medical card; three field tags; transport card; X-ray report; thirteen medical cards and five clinical records, the originals of which are on file in The Adjutant General's Office.

E. T. CONLEY,

Major General, U. S. Army,
The Adjutant General.

I hereby certify that E. T. Conley, who signed the foregoing certificate, is the Adjutant General of the Army, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, George H. Dern, Secretary of War, have hereunto caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 9th day of June, 1936.

[SEAL]

GEO. H. DERN,

Secretary of War.

By F. M. HOADLEY,
Assistant Chief Clerk.

Plaintiff's Exhibits.

BERRY, LE ROY A.

REPORT OF PHYSICAL EXAMINATION
OF THE MAN NAMED ABOVE

Accepted, 1st July, 1917, at Ft. Ethan Allen, Vt.

Enlisted, 1st July, 1917, Ft. Ethan Allen, Vt.

STATEMENT OF APPLICANT

Name: Le Roy A. Berry.

Residence: St. Johnsbury, Vermont.

Age: 22 years; Date and place of birth: April 4, 1895,
St. Johnsbury.

Occupation: farmer.

White or colored: white.

Married or single: single.

Name and address of last employer and duration of employment: D. A. Houghton, St. Johnsbury, Vt.

Do you know that if you secure your enlistment by means of any false statement or misrepresentation you are liable to trial by court-martial for fraudulent enlistment? yes.

Nationality of father: American.

Are you a citizen of the United States? yes.

State previous Army, Navy, or Marine Corps service: no.

Are you now, or have you been, a member of the organized militia of any State, Territory, or the District of Columbia? no.

Have you applied for enlistment before, and if so, when and where? no.

Are there any reasons for your parents or other relatives objecting to your enlistment? no.

Give names and addresses of persons dependent upon you for support: no.

Plaintiff's Exhibits.

Have you ever been convicted of a felony or imprisoned under sentence of a court in a reformatory, jail, or penitentiary? no.

Have you that your health and habits in any way interfere with your success in civil life? And if so, give details: no.

Have you ever since childhood wet the bed when asleep? no.

Do you consider that you are now sound and well? yes.

What illnesses, diseases, or accidents have you had since childhood? Pneumonia, Hip cracked.

Have you ever had any of the following? If so, give approximate dates:

Spells of unconsciousness: no.

Convulsions: no.

Gonorrhea: no.

Sore on penis: no.

Have you ever raised or spat up blood? no.

When were you last treated by a physician, and for what ailment? 1 mo. ago hip cracked.

Have you ever been under treatment at a hospital or asylum, and if so, for what ailment? At hospital for cracked hip, pneumonia.

I certify that the foregoing questions and my answers thereto have been read over to me, that I fully understand the questions, and that my answers thereto are correctly recorded and are true in all respects.

LEROY A. BERRY.

PHYSICAL EXAMINATION AT PLACE OF ENLISTMENT

Weight, 145 lbs.; height, 66 inches.

Girth of chest: At expiration 30 inches; at inspiration, 35 inches.

Respiratory system: normal.

Plaintiff's Exhibits.

Heart: Location of apex beat, normal. Pulse rate (standing) 79. Evidence of organic lesion, no. Evidence of functional disorder, no.

Skin, normal.

Nervous system: Patellar reflexes, normal. Tremors, no.

Bones and joints, normal.

Are there flat feet, or other deformities of the feet? No.

Hernia, no.

Varicocele, no.

Varicose veins, yes.

Hemorrhoids, no.

Genito-urinary system: normal.

Nose and throat: normal.

Eyes: Vision, right eye, 20/20; left eye, 20/20.

Ears: Hearing right ear, normal; left ear, normal.

Teeth: Missing—Upper, Right, 2 and 1. Lower, Left, 1 and 2.

I certify that I have carefully examined the applicant, and have correctly recorded the results of the examination and that, to the best of my judgment and belief, he has no mental or physical defect disqualifying him from service in the United States Army.

H. W. TAYLOR,

Examining Officer,

Capt., 1st Vt. Inf. N. G.

I certify that the applicant was enlisted by me this 1st day of July, 1917 at Ft. Ethan Allen, Vt.

B. S. HYLAND,

Lt. Col. 1st Vt. Inf. N. G.,

Recruiting Officer.

*Plaintiff's Exhibits.*REPORT OF PHYSICAL EXAMINATION OF ENLISTED MAN PRIOR
TO SEPARATION FROM SERVICE IN THE UNITED STATES ARMY

Berry, LeRoy Aylmer, 67902. Pvt., 2nd Overseas C. as D.
Photographer.

DECLARATION OF SOLDIER

Question. Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, disease, or that you have any disability or impairment of health, whether or not incurred in the military service? Answer. Yes.

Q. If so, describe the disability, stating the nature and location of the wound, injury, or disease. A. Amputation of left leg seven inches below knee. Result of high explosive shell.

Q. When was the disability incurred? A. June 16, 1918.

Q. Where was the disability incurred? A. Toul Sector, France.

Q. State the circumstances, if known, under which the disability was incurred. A. While in action.

I declare that the foregoing questions and my answers thereon have been read over to me, and that I fully understand the questions, and that my replies to them are true in every respect and are correctly recorded.

LEROY AYLMER BERRY.

Witness: C. A. Barlow, 2nd Lt. Inf., U. S. A., Asst. Car. Personnel ADJ.

Place, Camp Devens, Mass.

Date, Dec. 30, 1918.

Plaintiff's Exhibits.

CERTIFICATE OF IMMEDIATE COMMANDING OFFICER

I certify that:

In my opinion the wound, injury or disease did originate in the line of duty in the military service of the United States.

O. C. LANE, Jr.,

Captain, Infantry, U. S. A.,

2nd Overseas Casual Detachment,

Commanding 151st Depot Brigade.

Camp Devens, Mass., Dec. 30, 1918.

CERTIFICATE OF EXAMINING SURGEON

I certify that:

The soldier named above has this date been given a careful physical examination, and it is found that he is physically and mentally sound with the following exceptions: Amputation left mid leg. Disqualifying.

✓ The wound, injury, or disease is likely to result in disability.

In my opinion the wound, injury, or disease did originate in the line of duty in the military service of the United States.

In view of occupation he is 50 per cent disabled.

M. G. HEALY,

1st Lt., M. C., U. S. Army.

Camp Devens, Mass., Dec. 30, 1918.

REPORT OF BOARD OF REVIEW.

From a careful consideration of the case and a critical examination of the soldier, we find he is physically and mentally sound with the following exceptions: Amputation left mid leg. Disqualifying. Cannot be improved by treatment.

The wound, injury, or disease is not likely to result in disability.

Plaintiff's Exhibits.

In our opinion the wound, injury, or disease originate in the line of duty in the service of the United States.

In view of occupation, he is fifty per cent disabled.

W. B. JONES,

Major, M. C., U. S. Army.

H. SPARREBERG,

1st Lt., M. C., U. S. Army.

Camp Devens, Mass., Dec. 30, 1918.

REPORT OF DISABILITY BOARD

Held at Base Hospital No. 9, A. E. F., under G. O. No. 41,
G. H. Q., A. E. F., March 14, 1918.

August 15th, 1918.

Berry, Leroy A., 67902, Private, Co. E, 103rd Inf.

Admitted from Base Hospital No. 66, A. E. F.

Sent to Base Hospital No. 8, A. E. F.

1. Nature of disability: G. S. W., battle June 16, 1918, multiple wounds R. thigh & left leg, resulting in amputation left leg, mid third.
2. Disability did not exist prior to entry into service.
3. Disability is in line of duty.
4. Classification: D.
5. Nature of duty recommended: Return to the United States.

RALPH G. STILLMAN,

Capt., Medical Corps, U. S. R.

EDWARD CUUTE,

Capt., Medical Corps, U. S. R.

R. W. BOLLING,

1st Lt., Medical Corps, U. S. R.

Brother, Ira L. Berry, Sheffield, Vt.

Plaintiff's Exhibits.

Berry, 67902, Leroy A.

6/25/18—1321—Left hip—FB 30 mm. in from skin mark on lateral surface of thigh. Size 8x20 mm. Lies above greater trochanter, and is posterior to plane of femur.

6/28/18—1339—Right hip—FB as localized above removed under fluoroscope.

X ray report. E. AC. Hosp. 1.

FIELD MEDICAL CARD

Name, Berry, LeRoy A.

Rank, Pvt. No. 67902.

Regiment or Staff Corps, Prvt. 103 Inf., Co. E.

Wounded—Line of duty, Yes.

Evac. Hosp. No. 1.

A. T. Serum, dose and date: 5.30 a.m., June 16, 1918.

Diagnosis: G. S. W. battle. Perf on (1) L. leg lower $\frac{1}{3}$ "S" F. C. C. both bones "S" (2) R. thigh "S".

Evacuation Hospital No. 1.

Date of Entry, July 1, 1918.

Taken up under new system. July 30, amputation stump healed except small sinus.

G. B. DUDLEY,

Capt. M. R.

U. S. Army General Hospital No. 3, Post Office, Rahway,
N. J.

Card mailed to Med. Rec. Sec. S. G. O., 9-27-18.

J. DONEY,
2nd Lt.

Plaintiff's Exhibits.

Base Hospital No. 66.

Date of entry, July 30-18.

8/5/18.

Transferred to Base No. 9.

ORVILLE R. MILLER,

1st Lt. M. R. C.

Base Hospital No. 5, A. E. F.

Date of entry, August 8, 1918.

On June 16, 1918, while in combat patient states he received a G. S. W. (shell) of left leg and right thigh. Almost a traumatic amputation of left leg which was amputated at Evacuation Hosp. No. 1 on 6/16/18.

On admission: Patient has an amputation of the left leg in the middle third. Stump healed and ready for fitting of provisional peg leg. Movements about the knee good. General condition good. 8/14/18, provisional peg leg fitted and he walks well.

LT. E. J. ROSE,

M. R. C.

U. S. S. America, 8/29/18 to 9/7/18: On board for transportation to U. S.

1. Name, Berry, LeRoy A. Rate, Army super.
2. Enlisted: W. Pvt., Co. E, 103rd Inf.
3. Born: Date, 1895.
4. Received as patient from U. S. A. Base Hosp. No. 8, A. E. F.
5. Diagnosis, G. S. W., battle, s, multiple, right thigh and left leg, amputation left leg middle third.
7. Taken up as R. A. Date, 8/29/18. Origin, D.
8. Disposition, T. Date, 9/7/18. Sick days, 9.
9. Transferred as patient to Hospital at Boston, Mass.
10. This card sent from U. S. S. America.

Plaintiff's Exhibits.

Date, hour and station where tagged, 16—June 18, 11:30 o'clock (illegible).

Name, Ferry, 67902, LeRoy A.

Rank and Regt. or Corps: Pvt., Co. E, 103rd Inf.

Diagnosis: G. S. W., F. C. C., left leg.

Treatment: A. T. S.

Signature: Rand A. Pierce, 1st Lt. M. C., N. G.

Date, hour and station where tagged: 31 May, 1918, Bois Jung, 8:30 o'clock.

Name, Berry (67902) LeRoy A.

Rank and Regt. or Corps: Pvt., Co. E, 103rd Infantry.

Treatment: Influenza.

Signature: Trans. to Rand A. Pierce, 1st Lt. M. C., N. G.

Date, hour and station where tagged: March 9, 1918, P. S. Francinette.

Name, LeRoy A. Berry.

Rank and Regt. or Corps: Pvt., 103rd Inf., Co. E.

Diagnosis: Parotitis left.

Treatment: Transferred to R-1.

Signature: Robert O. Blood, M. C.

POST HOSPITAL, FT. BANKS, MASS.

CLASSIFICATION FOR DISTRIBUTION

Date of Classification, Sept. 14, 1918.

1. Name, Berry, Leroy A.

Plaintiff's Exhibits.

2. Rank & Org., Pvt., Co. E., 103rd Inf.
 3. Briefed, but clearly stated diagnosis: Amp. left leg, upper and middle third.
 4. Classed as: Surg. Amputation.
 5. Ambulatory. Bed Patient.
 6. (a) Is individual attendant required for this patient during transfer? No. (b) If individual attendant not needed, is any assistance required by him during his transfer? No. (c) Is this a litter case? No.
 8. Home District: Vt.
 9. To be transferred to: G. H. No. 3, Colonia, N. J.
- Examining Surgeon: William J. Ezubin, Capt. M. C.

SERVICE DE SANTE

18 Mar 1918.

No du Carnet, 4.

No du Feuillet, 79.

Indication de la Formation Sanitaire, Ambulance 12/14,

Secteur 181.

Date de l'Entrée, 10/3/18.

Nom: Berry.

Prénoms: LeRoy A.

Corps, 103 Infantry.

Secteur Postal No B. C. M.

Compagnie Escadron ou Batterie, E.

Grade, Pvt.

Position militaire: M Service Aug. 14.

Classe de Recrutement, 1918.

Date et lieu de naissance, April 4, 1895, Vermont.

Diagnostic d'entrée: Mumps.

Origine: La blessure ou la maladie a-t-elle été contractée: en service commandé? Yes.

Plaintiff's Exhibits.

Date et lieu : 10/5/18, R-1.

Adresse de la famille : Mr. R. L. Berry, Sheffield, Vermont.

Mode d'entrée : Vermont de sur Corps.

Secteur postal no 181 le 10/3/18.

L'Officier d'Administration gestionnaire,

H. MARTZ,

Le Médecin-chef.

[SEAL]

Berry, LeRoy A.

Pvt., Co. E, 103rd Infantry.

Mumps.

Admitted March 10, 1918.

Born April 4th, 1895, Vermont.

Emergency address, Mr. L. Berry, Sheffield, Vt.

No. 1324.

Surname, Berry.

Christian Name, LeRoy.

Rank, Pvt.

Company, E.

Regiment, 103d Inf.

Nature of casualty, Injury.

Disease, etc., Septic little finger R. hand.

Place of injury, or treatment, Hdq. 103d Inf.

Date of entry, Jan. 31/18.

Disposition, Duty.

Date of disposition, Feb. 4, 1918.

Days: Total, 4.

List of S. & W. with Hdq. 103d Inf.

At A. E. F. France.

For period Jan. 1918, Feb. 1918.

Plaintiff's Exhibits.

Serial No. 221.

Surname, Berry.

Christian name, Leroy A.

Rank, Pvt.

Company, E.

Regiment, 103rd Inf.

Nature of casualty, Sick.

Disease, Mumps.

Line of duty, Yes.

Place of injury, or treatment, France.

Date of entry, Mar. 10, 1918.

List of S. & W. with Det. of 101st Amb. Co., Ambulance
12/14, Contagious.

At Vauxbuin, A. E. F.

For period March, 1918.

Serial No. 868.

Surname, Berry.

Christian name, LeRoy A.

Rank, Pvt.

Company, E.

Regiment, 103rd Inf.

Nature of casualty, Sick.

Disease, Influenza.

Place of injury, or treatment, Hqrs. 2nd Bn.

Date of entry, May 31, 1918.

Disposition, Trans. F. H. 102.

Date of disposition, May 31, 1918.

List of S. & W. with 103rd Inf.

At A. E. F., France.

For period May 1918.

Plaintiff's Exhibits.

1. Surname, Berry.
2. Christian Name, Leroy A.
3. Rank, Pvt.
4. Company, E.
5. Regt. or Staff Corps, 103 Inf.
6. Age Yrs., 23.
7. Race, W.
8. Nativity, Vt.
9. Service yrs., 11/12.
10. Register No. 3213.
11. Date of Admission, June 1/18.
12. Source of Admission, fr command.
13. Cause of Admission, Influenza acute. Hospital.
14. In line of duty, Yes.
16. Disposition, Duty per H. A. E. F.
17. Date of Disposition, June 8/18.
18. Name of Hospital, etc., 101st Field Hospital, A. E. F.

JOHN G. W. KNOWLTON,

Major M. C. N. G., U. S. Army.

1. Surname, Berry, 67902.
2. Christian Name, Leroy A.
3. Rank, Pvt.
4. Company, E.
5. Regiment or Staff Corps, 103rd Inf.
6. Age yrs., 23.
7. Race, W.
8. Nativity, Vt.
9. Service yrs., 1.
10. Register No., 1681.
11. Date of admission, 16 June 1918.
12. Source of admission, F. H. No. 102.

Plaintiff's Exhibits.

13. Cause of admission, G. S. W. Battle, severe, perf, L. leg, F. C. C. both bones, R. thigh, received in action with the enemy, France, 16 June 1918. Hosp.

14. In line of duty? Yes.

15. Complication, Seq., etc., 16 June 1918. Operation 11 hours after injury. Amputation L. leg lower $\frac{1}{3}$. Wound R. thigh traced deeply. No F. B. found. Carrel tubes. Anesthe, Ether. 24 June 1918. Fluoroscopic examination revealed F. B. R. hip. (a).

16. Disposition, Tr. to Base Hospital No. 66, A. E. F.

17. Date of disposition, 30 July 1918.

18. Name of hospital, etc., Evacuation Hospital No. 1, Adv. Sec. S. O. S., A. E. F.

L. E. S.

Year 1918.

1st Lieut. M. R. C., U. S. Army.

In Hospital, June, 15 days.

In Hospital, July, 29 days.

Total, 44 days.

A. T. S. given 16 June 1918.

(a) 27 June 1918. Operation. Incision and removal F. B. R. hip. Anesthe, Ether.

1. Surname, Berry.
2. Christian Name, LeRoy C.
3. Rank, Pvt.
4. Company, C.
5. Regiment or Staff Corps, 103 Inf.
6. Age, yrs., 23.
7. Race, W.
8. Nativity, Vt.
9. Service, yrs., 1-1/12.
10. Register No., 67902.

Plaintiff's Exhibits.

11. Date of Admission, June 16, 1918.
12. Source of Admission, July 30, 1918. Evac. Hosp. 1.
13. Cause of Admission, Convalescent from G. S. W.—S.—multiple, R thigh: L leg. F. C. C.—L. tibia and fibula. Operation and amputation of leg, L, at Evac. Hosp. 1. Received in action on Toul Hosp. front June 16, 1918.
14. In Line of Duty? Yes.
16. Disposition, Trans. to Base Hosp. 9.
17. Date of Disposition, Aug. 8, 1918.
18. Name of Hospital, etc., Base Hosp. 66, Am. E. F. Register card 7792.

1. Surname, Berry.
2. Christian Name, LeRoy A.
3. Rank, Pvt.
4. Company, E.
5. Regiment or Staff Corps, 103d Inf.
6. Age, yrs., 23.
7. Race, W.
8. Nativity, Vt.
9. Service, yrs., 1-2/12.
10. Register No., 67902.
11. Date of Admission, July 1/18.
12. Source of Admission, Base Hosp. No. 66, A. E. F.
13. Cause of Admission; G. S. W., battle, severe, multiple, right thigh and left leg, amputation left leg, mid third, June 16/18. Hosp.

14. In line of duty? Yes.
16. Disposition, Trans. to Base Hosp. No. 8, A. E. F., per par 1 S. O. 232, Base Hosp. No. 9, A. E. F., Aug. 21/18.
17. Date of disposition, Aug. 22/18.
18. Name of hospital, etc., Base Hospital No. 9, A. E. F.

G. W. Z.

Capt. M. C., U. S. R., U. S. Army.

Plaintiff's Exhibits.

1. Surname, Berry.
2. Christian Name, LeRoy A.
3. Rank, Pvt.
4. Company, E.
5. Regiment or Staff Corps, 103rd Inf.
6. Age, yrs., 23.
7. Race, W.
9. Service, yrs., 1-1/12.
10. Register No., 67902.
11. Date of admission, Aug. 22nd, 1918.
12. Source of admission, Base Hosp. No. 9, A. E. F. Casual S. C. D.
13. Cause of admission, G. S. W., battle, S, multiple, right thigh and left leg, amputation left leg middle third.
14. In line of duty? Yes.
16. Disposition, T. F. D. to transport per auth. G. Base Sec. No. 1, A. E. F. with view to S. D. D.
17. Date of disposition, Aug. 28, 1918.
18. Name of Hospital, etc., Base Hospital No. 8, A. E. F. H. J. H.

1st Lieut. Sanitary Co., U. S. Army.

1. Surname, Berry.
2. Christian Name, LeRoy A.
3. Rank, Pvt.
4. Company, E.
5. Regiment or Staff Corps, 103rd Inf.
6. Age, yrs., 23.
7. Race, W.
9. Service, yrs., 1-1/12.
11. Date of admission, 29th Aug., 1918.
12. Source of admission, U. S. A. Base Hosp. Casual S. C. D., No. 8, A. E. F.

Plaintiff's Exhibits.

13. Cause of admission, G. S. W., battle, S, multiple, right thigh and left leg, amputation left leg, middle third.
14. In line of duty? Yes.
15. Complication, Sec., etc., S. G. O. Note: Card from Navy Surgeon. No Form 51 and Form 51A.
16. Disposition, T. to Hospital at Boston, Mass.
17. Date of disposition, 9/7/18.
18. Name of Hospital, etc., U. S. S. America.
20. From U. S. S. America.

R. I. LONGHAUGH,
Surgeon, U. S. Navy.

A. G. No. 67902.

1. Surname, Berry.
2. Christian Name, LeRoy A.
3. Rank, Pvt.
4. Company, E.
5. Regiment or Staff Corps, 103rd Inf.
6. Age, yrs., 23.
7. Race, W.
8. Nativity, Vt.
9. Service, yrs., 1-3/12.
10. Register No., 571.
11. Date of admission, Sept. 26, 1918.
12. Source of admission, Hqs. N. E. D., Boston, Mass.
13. Cause of admission, Amputation, left lower leg, nine (9) inch stump, resulting from Fracture, comp/comm. of same, due to High Explosive, in battle June 16, 1918. A. E. F. Convalescent from. Hosp.
14. In line of duty? Yes.
16. Disposition, Transferred to B. H. Camp Devens, auth. 1st Ind: A. G. O., W. D., Dec. 4, 1918. (a)
17. Date of disposition, Dec. 19, 1918.

Plaintiff's Exhibits.

18. Name of hospital, etc., U. S. A. G. H. No. 3, Colonia,
N. J.

19. Sent with report of S. & W. for month of Dec. 1918.

G. Wm. JOKLENDIOUN,
Capt. M. C., U. S. Army.

A. S. No. 67902.

1. Surname, Berry.

2. Christian Name; LeRoy A.

3. Rank, Pvt.

4. Company, E.

5. Regiment or Staff Corps, 103rd Inf.

6. Age, yrs., 23.

7. Race, W.

8. Nativity, Vt.

9. Service, yrs., 1.3/12.

10. Register No., 36221.

11. Date of admission, Dec. 20, 1918.

12. Source of admission, Trans. from U. S. A. Gen. Hosp.
No. 3, Rahway, N. J., per S. O. No. 75, (a).

13. Cause of admission, Convalescent from. Old, G. S. W.,
H. E., left lower leg, seven inches below knee joint, incurred in
action at Toul sector, France, June 16, 1918. Hosp.

14. In line of duty? Yes.

15. Disposition, Duty.

16. Date of disposition, Dec. 21, 1918.

17. Name of hospital, etc., Base Hospital, Camp Devens,
Mass.

18. Sent with report of S. & W. for month of Dec. 1918.

19. From, same.

E. S. W.

Capt. M. C., U. S. Army.

A. S. No. 67902.

1. Surname, Berry.

2. Christian Name, Leroy A.

Plaintiff's Exhibits.

3. Rank, Pvt.
4. Company, Overseas Casual.
5. Regiment or Staff Corps, 151st Depot Brigade.
6. Age, yrs., 23.
7. Race, W.
8. Nativity, Vt.
9. Service, yrs., 1-6/12.
10. Register No., 10393.
11. Date of admission, Jan. 2, 1919.
12. Source of admission, Command; carded for record only; not currently on the (a).
13. Cause of admission, Amputation left middle leg; disability incurred in action with A. E. F., at Toule sector, France, June 16, 1918.
14. In line of duty? Yes.
16. Disposition, Discharged by Demob. Order W. D. Nov. 15, 1918 & Para 19 S. O. 291 Hdqrs. U. S. A. C. Camp Devens, Mass. Degree of disability—50%.
17. Date of disposition, Jan. 2, 1919.
18. Name of hospital, etc., Infirmary, 151st Depot Brigade, Camp Devens, Mass.
19. Sent with report of S. & W. for month of Jan. 1919.
20. From same.

G. R. C.

Major, M. C., U. S. Army.

Overseas. Form 55a

Carded for Record

Medical Department, U. S. Army

(Authorized Jan. 17, 1916)

CLINICAL RECORD

BRIEF

67902

Hospital, Base.

Register No. 36221. Ward, S1.

Name, Berry, Leroy A.

Plaintiff's Exhibits.

Rank, Pvt. Co. E. Regt. or Staff Corps, 103 Inf.
 • Age, 23. Race, W. Service 18/12.
 Birthplace, Vermont.
 Station, Camp Devins, Mass.
 Date of admission, Dec. 20, 1918.
 Source of admission, Transfer.
 Religion, Protestant.
 Home address, Sheffield, Vermont.
 Name and address of nearest relative, Brother, Raymond
 Berry, same as above.
 Initials of admitting officer, L. H. S.
 Disposition, Duty.
 Date, Dec. 21, 1918.

Final diagnosis: Amputation leg, left, lower, 7 inches below
 knee joint. (2) Convalescing from gun shot wound of thigh,
 right, upper third, single. Incurred June 16, 1918 in battle at
 Toul Sector, France.

Condition on completion of case: L. D., yes, cured.

L. A. WYLIE, Lt. M. C.,
 Ward Surgeon.

WARD SURGEON'S DIAGNOSES SHEET

Cause of admission, complications, change of diagnoses, addi-
 tional diagnoses, operations in full, with dates: Amputation, leg,
 left lower, 7 inches below knee joint. (2) Convalescing from
 gun shot wound of thigh; Right, upper third.

L. A. WYLIE.

CLINICAL RECORD—OBJECTIVE SYMPTOMS

Condition on admission: Walking.
 Weight: Normal, 153; Present, 150.

Plaintiff's Exhibits.

General condition: Good.

Special senses: Neg.

Skin and mucous membranes: Neg.

Glandular system: Neg.

Vascular system: Neg.

Blood pressure: Not taken.

Heart: Normal.

Lungs: Neg.

Genito-urinary system: Neg.

Abdomen: Neg. Liver, Neg. Spleen, Neg. Tenderness,
Neg. Masses, Neg.

Nervous system: Neg.

Osseous system: G. S. Wound thigh, right, medial surface
thigh, healed, also wound healed outer surface thigh right upper
thigh.

Muscles and joints: Amputation wound left leg, lower, 7
inch from joint, healed.

Diagnosis on transfer card: Transfr. from Gen. Hosp.
Amputation of lower left leg middle third. Gunshot wound right
thigh.

Diagnosis of ward surgeon: Amputation, leg, left, lower
7 inches below knee joint. Convalescing from gun shot wound
of right, thigh, upper third.

Berry, LeRoy A.

L. A. WYLIE.

CLINICAL RECORD

BRIEF

571

4

Hospital, U. S. A. Gen. Hosp. No. 3, Colonia, N. J.

Register No. 571. Ward 4.

Name, Berry, LeRoy A. 67902.

Rank, Pvt. Co. E. Regt. or Staff Corps, 103rd Inf.

Age, 23. Race, W. Service, 1 $\frac{3}{4}$ years.

Birthplace, Vt.

Plaintiff's Exhibits.

Station, U. S. A. } Gen. Hosp. No. 3, Colonia, N. J.

Date of admission, Sept. 26, 1918.

Source of admission, Hq. N. E. D., Boston, Mass.

Religion, Prot.

Home address, Sheffield, Vt.

Name and address of nearest relative, Brother, Raymond

Berry, same address.

Initials of admitting officer, E. P. W.

Disposition, Trans. B. H. Camp Devens, Mass.

Date, Dec. 19, 1918.

Final diagnosis: Amputation, left lower third.

LIEUT. MORRISON, M. C.,

Ward Surgeon 1 M.

Per W. D. W.

571

FAMILY AND PERSONAL HISTORY

Nov. 14, '18.

Occupation: Farmer.

Tropical service: No.

Habits as to alcohol: Occasional.

Family history: No bearing.

Previous personal history: Pneumonia 2 years ago. Otherwise negative.

Gunshot wounds or other casualties: Left wrist fracture 10 years ago. Fracture right hip, 1 year ago.

Venereal history: Denies.

H. F. MORRISON.

571

HISTORY OF PRESENT DISEASE

Nov. 14, '18.

June 16, 1918, Toul sector front line trench, was struck by fragment of high explosive shell, causing traumatic amputa-

Plaintiff's Exhibits.

tion of left lower leg. G. S. W. of right thigh penetrating (this now healed). Reamputation on June 16, 1918 and Dakin (illegible) until July 8th when plastic done and wound closed. Healed by first intention. Was fitted with pylon at Chataneau base No. 9, wearing it now on admission.

H. F. MORRISON.

571

SUBJECTIVE SYMPTOMS

Nov. 14, '18.

Condition on admission: No subjective symptoms.

H. F. M.

571

OBJECTIVE SYMPTOMS

Condition on admission: Amp. left leg, healed, wearing pylon.

Weight: Normal 145; Present, 153.

General condition: Good.

Special senses: Normal.

Skin and mucous membranes: Normal.

Glandular system: Normal.

Vascular system: Normal.

Blood pressure: Not taken.

Heart: Normal.

Lungs: Normal.

Genito-urinary system: Normal.

Abdomen: Normal. Liver, Normal. Spleen, Normal.

Tenderness, None. Masses, None.

Nervous system: Normal.

Osseous system: See form 55C.

Muscles and joints: See form 55C.

Diagnosis on transfer card: Amputation left leg upper and middle third.

Plaintiff's Exhibits.

Amputation, left lower leg, nine (9) inch stump resulting from F. C. C. of same, due to high explosive in battle June 16, 1918, A. E. F.

J. G.

(Conv. from.)

571

PROGRESS

10/2/18. Patient presents a healed stump of left lower leg mid third. The scar extends A. P. over the stump end. The fibula is $\frac{1}{2}$ " longer than the tibia. There is no pain or tenderness present. Ready for artificial limb. On the inner aspect of the right thigh is 6" healed scar, and some keloid formation.

H. F. MORRISON.

Wd. 24.

Nov. 14, '18.

Returned from sick pass. Walking on peg leg. Should be transferred to Wd. 25.

H. F. MORRISON.

Nov. 15, '18.

Transferred to Wd. 25, because of amputation.

H. F. M.

REPORT ON URINE

Sept. 26, 1918.

To Ward IV.

Color, Straw. Appearance, Clear.

Reaction, Acid. Specific gravity, 1.016.

Albumin, Neg. Sugar, Neg.

H. E. FUST,

1st Lt., M. C., U. S. Army.

Plaintiff's Exhibits.

571

TREATMENT

9/26/18. Admitted, walked in. General diet. Transferred to Ward XXII.

10/15/18. Sick pass for 30 days.

11/21. Recommended by Col. Silver and Maj. Albee, $\frac{3}{16}$ of an inch elevation on inner side of heel.

8/10. Received pylon.

11/23. Received artificial limb.

W. H. B.

571

TEMPERATURE, ETC.

11/28. Patient has no temperature while stay in Ward 25.

W. H. B.

BERRY, LeROY.

CLINICAL RECORD

41

BRIEF

Hospital, B. H. 66.

Register No. 67902. Ward 44.

Name, Berry, Le Roy A.

Rank, Pvt. Co. E. Regt. or Staff Corps, 103rd Inf.

Age, 23. Race, W. Service, $1\frac{1}{2}$ years.

Birthplace, Vt.

Station, June 16, 1918.

Date of admission, July 30, 1918.

Source of admission, Trans. from Evac. Hosp. 1.

Religion, Prot.

Home address, Sheffield, Vt.

Name and address of nearest relative, Brother, Mr. R. L.

Berry, same.

Plaintiff's Exhibits.

Initials of admitting officer, T. F. F.

Disposition, Transferred to Base No. 9.

Date, Aug. 7, '18.

Final diagnosis: G. S. W., multiple right thigh left leg.
Comp. comminuted fracture left tibia and fibula. Amputation
left leg.

Condition on completion of case: No change.

ORVILLE R. MILLER,

Ward Surgeon.

OPERATION REPORT

Diagnosis: T. B. R. thigh.

Operation: Incision and removal of T. B.

Date, June 27/18.

Anesthetic used: Ether. Amount: \bar{z} iv.

Administration of anesthetic begun: 2.55 P.M.

Administration of anesthetic ended: 3.05 P.M.

Operation begun: 3.10 P.M.

Operation ended: 3.15 P.M.

Anesthetizer: M. Gibson.

Operator: Capt. Dudley.

Lt. HICKMAN, U. S. Army,

In charge of Operating Room.

RADIOGRAPHIC REPORT

From Laboratory, X-ray E. H. No. 1.

To Ward A-1.

June 28, 1918.

Region fluoroscoped, Right thigh.

Findings: F. b. as localized—see 1321—removed under
fluoroscope.

L. AUTELL,

1st Lieut., M. R. C., U. S. Army.

BERRY 67902 LEROY A.,

Pvt. Co. E, 103 Inf.

Plaintiff's Exhibits.

CLINICAL RECORD

BRIEF

Hospital, Evac. Hosp. No. 1.

Register No. 1681. Ward B-7.

Name, Berry, Leroy A., 67902.

Rank, Pvt. Co. E. Regt. or Staff Corps, 103 Inf.

Age, 23. Race, W. Service 1 year.

Birthplace, Vt.

Station, A. E. F.

Date of admission, 2.45 p.m., 16 June, 1918.

Source of admission, 102 F. H.

Religion, Pro.

Home address, Sheffield, Vt.

Name and address of nearest relative, Brother, R. L. Berry,
Sheffield, Vermont.

Initials of admitting officer, J. P.

Final diagnosis: G. S. W., battle. Perf. wd. (1) Left leg
"S" fract. C. C. both bones "S". (2) R. thigh "S" "L".

5.30 a.m., 16 June, G. S. W., F. C. C. L. leg, G. T. S.

HISTORY OF PRESENT DISEASE

4.30 a.m., June 16, 1918, during enemy bombardment was
wounded by explosion of enemy. H. E. S. in L. foot, R. thigh.

June 28, flaps of stump turned down loosely.

681

OPERATION REPORT

A-1

Diagnosis: G. S. W., F. C. C. (1) Left leg. (2) S. W.
inner aspect R. thigh.

Operation: (1) No anterior or post. tibial pulsation lower
leg. Badly lacerated and comminuted fractures both bones—

Plaintiff's Exhibits.

amputation. (2) (illegible) thigh penetrating wd. June 16/18
 No X-ray had been taken. Wd: traced deeply. No F. B. found
 Carrel shock infusion.

Anesthetic used: Ether. Amount: 3vii.

Administration of anesthetic began: 3.30 P.M.

Administration of anesthetic ended: 4.30 P.M.

Operation begun: 3.45 P.M.

Operation ended: 4.40 P.M.

Anesthetizer: M. Gibson.

Operator: Maj. Pool.

LIEUT. HICKMAN, U. S. Army,
 In charge of Operating Room.

RADIOGRAPHIC REPORT

From Laboratory, X-ray E. H. No. 1.

June 24, 1918.

To Ward A-1.

Region radiographed, Right thigh.

Findings: Right hip—F. B. 30 mm. in from skin mark on
 lateral surface of thigh. Size 8x20 mm. Lies above greater
 trochanter and posterior to plane of femur.

IRA H. LOCKWOOD,
 1st Lieut., M. R. C., U. S. Army.

LABORATORY REPORT, MISCELLANEOUS

2813

From Laboratory, Evacuation No. 1.

July 17, 1918.

To Captain Dudley, Ward D-1.

Specimen from stump: Smear culture *Mf. staphylococcus*
aureus.

T. C. BEEBE,
 Capt., M. R. C.,
 H. Rg., U. S. Army,

Plaintiff's Exhibits.

FAMILY AND PERSONAL HISTORY

Occupation: Teamster.

Tropical service: None.

Habits as to alcohol: Moderate.

Family history: None.

Previous personal history: Has had measles, mumps and pneumonia.

Gunshot wounds or other casualties: None.

Venereal history: None.

History of present disease: June 16/18, during enemy bombardment was wounded by high explosive shell in left foot and right thigh.

Abdomen: Liver, Spleen, Tenderness, Masses, Neg.

Nervous system: Neg.

Osseous system: Amputation left leg.

Muscles and joints: Neg.

Diagnosis of ward surgeon: G. S. W. of multiple right thigh; left leg. Comp. comminuted fracture left tibia and fibula. Amputation left leg.

OBJECTIVE SYMPTOMS

Weight: Normal, 145.

General condition: Good.

Special senses: Normal.

Skin and mucous membranes: Normal.

Glandular system: Normal.

Vascular system: Normal.

Heart: Normal.

Lungs: Normal.

Genito-urinary system: Normal.

Plaintiff's Exhibits.

LABORATORY REPORT, MISCELLANEOUS

From Laboratory, Base Hosp. No. 66.

July 31, 1918.

To M. O., Ward 35-B.

Specimen from urine: Color, straw. Reaction, acid. Albumin, neg. Appearance, turbid. Sp. gr., 1008. Sugar, neg. Micro., neg.

R. N. DAVIS,
Lt., M. R. C., U. S. Army.

CLINICAL RECORD

571

OBJECTIVE SYMPTOMS

Nov. 14, '18.

Condition on admission: Amputation mid third left lower leg.

Weight: Normal, 148; Present, 148.

General condition: Good.

Special senses: Negative.

Skin and mucous membranes: Clear.

Glandular system: Negative.

Vascular system: Negative.

Blood pressure: Not taken.

Heart: Negative.

Lungs: Clear.

Genito-urinary system: Negative.

H. F. MORRISON.
BERRY, LEROY A.

Plaintiff's Exhibits.

CLINICAL RECORD

/6

BRIEF

Hospital, F. H. 102.
Register No. 3212. Ward D-6.
Name, Berry, Le Roy A., 67902.
Rank, Pvt. Co. E. Regt. or Staff Corps, 103 Inf.
Age, 23. Race, W. Service, $1\frac{1}{2}$ year.
Birthplace, Vt.
Station, A. E. F.
Date of admission, June 1, 1918.
Source of admission, F. H. 102.
Religion, Protestant.
Home address, Sheffield, Vt.
Name and address of nearest relative, Brother, R. L. Berry,
e address.
Initials of admitting officer, M. A. C.
Disposition, Duty.
Date, June 8, 1918.
Final diagnosis, Influenza, acute.
Condition on completion of case, Recovery.

CHAS. S. WALKER,
Ward Surgeon,
Capt., M. C., N. G.

FAMILY AND PERSONAL HISTORY

Occupation: Teamster.
Habits as to alcohol: Occass. beer.
Family history: Neg.
Previous personal history: Pneumonia, 1916.
Gunshot wounds or other casualties: Neg.
Venereal history: Neg.

Plaintiff's Exhibits.

HISTORY OF PRESENT DISEASE

For three days has had severe headache, dizziness, body pains and exhaustion.

SUBJECTIVE SYMPTOMS

Condition on admission: Dizziness, headache, body pains, exhaustion, chills and feverish.

OBJECTIVE SYMPTOMS

Weight: Normal, 145; Present, 145.
General condition: Good.
Special senses: O. K.
Skin and mucous membranes: Normal.
Glandular system: Normal.
Vascular system: Normal.
Heart: Normal.
Lungs: Normal.
Genito-urinary system: Normal.
Abdomen: Liver, Normal. Spleen, Normal. Tenderness, None. Masses, None.
Nervous system: Normal.
Osseous system: Normal.
Muscles and joints: Normal.
Diagnosis on transfer card: Influenza.
Diagnosis of ward surgeon: Influenza.

DEFENDANT'S EXHIBITS

Defendant's Exhibit A

May 29, 1919.

To Bureau of War Risk Ins.,
Washington, D. C.

Dear sirs:

I wish to reduce my Ins. from \$10,000 to \$5,000. Will you please advise me as to how this is done or send me necessary forms for same, and oblige,

C-114614

LEROY AYLMER BERRY,
402 West 47th St., New York, N. Y.

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

UNITED STATES OF AMERICA,

Defendant-Appellant

vs:

LEROY A. BERRY,

Plaintiff-Appellee

Law No. 1183

STIPULATION

It is hereby stipulated and agreed that Government Exhibit A-1, being a pencil copy report of a physical examination dated July 16, 1920, be omitted from the printed record of this case on appeal.

Defendant's Exhibits.

Dated at Brattleboro, Vermont, this 10th day of November,
A.D., 1939.

ERNEST W. GIBSON, JR.,

Attorney for Plaintiff-Appellee.

Dated at Burlington, Vermont, this 9th day of November,
A.D., 1939:

TIMOTHY A. CURTIN,

Attorney for Defendant-Appellant.

Filed November 13, 1939.

AUSTIN H. KERIN, *Clerk.*

By A. MYRL BLAKELY, *Deputy.*

Government's Exhibit A-2

MEDICAL QUESTIONNAIRE

WAR RISK INSURANCE CASE

Name of veteran, Leroy A. Berry.

Name of doctor, John P. Tierney.

Date of examination, 7/16/20.

From what school or medical college are you a graduate? U.
of Maryland.

How long have you practiced your profession? Twenty-five
years.

Was examination made by you personally? Yes.

Is the report signed by you? Yes.

Was the history of the veteran taken from him by you personally? Yes.

Was your examination made for disability compensation purposes or as the basis for treatment? Compensation and Vocational Training.

Defendant's Exhibits.

Did you examine the veteran in the capacity of a Government physician or as a private physician? Government.

What was your diagnosis? Amputation Stump.

Prognosis? Excellent.

Is it your opinion that the claimant was suffering from any impairment of mind or body at the time of your examination which would render it impossible for him to follow continuously any substantially gainful occupation? No.

If either of the two preceding questions is answered in the negative, what substantially gainful occupations do you believe the veteran could have followed with reasonable regularity at the time of your examination or at some subsequent time? Auto Mechanic.

Are you employed in any branch of the Federal Government at the present time? Yes.

Name of Department, Veterans Adm.

Capacity, Designated Examiner—fee basis.

Date, 1/20/37.

DR. JOHN P. TIERNEY,

85 Railroad St.,

St. Johnsbury, Vt.

Witness

C. E. PELLETIER, Special Agent

F. B. I., U. S. Dept. Justice

Room 950—10 P. O. Sq.

Boston, Mass.

*Defendant's Exhibits.***Government's Exhibit A-3**

UNITED STATES OF AMERICA
VETERANS ADMINISTRATION

November 21, 1938.

The undersigned, having authority delegated by the Administrator of Veterans' Affairs to authenticate copies of public documents, records or papers belonging to or in the files of the Veterans' Administration pursuant to the provisions of Public No. 430, 74th Congress, does hereby certify that the annexed paper, composed of two sheets, is a copy of a true, correct and complete statement of all payments made pursuant to awards approved under the provisions of the War Risk Insurance Act, October 6, 1917 as amended, the World War Veterans' Act, June 7, 1924 as amended, Public No. 2, 73d Congress, as amended by Public No. 78 and Public No. 141, 73d Congress, on account of Military and Naval Compensation and Army and Navy Pensions in the case of Leroy Aylmer Berry, C-114,614, as shown by the records on file in the Veterans Administration.

In witness whereof, I have hereunto set my hand and caused the seal of the Veterans Administration to be affixed on the day and year first above written.

[SEAL]

H. V. STIRLING,
Director of Finance.

BERRY, Leroy Aylmer,
C-114,614

Defendant's Exhibits.

COMPENSATION PAYMENTS MADE IN THE CASE OF
LEROY AYLMEER BERRY

No. of Checks	Period Covered	Rate	Amount	Approximate Date of Issue
1 (Init.)	1- 3-19 to 2-28-19	\$ 30.00	\$ 58.06	3-29-19
2	3- 1-19 to 4-30-19	30.00	60.00	
(a) 1	5- 1-19 to 5-31-19	45.00	45.00	
(b) 1 (Adj.)	5-14-19 to 6-30-19	30.00	21.29	7-19-19
(c) 1 (Adj.)	7- 1-19 to 7-10-19	30.00	9.68	8- 4-19
(d) 1 (Adj.)	(1- 3-19 to 4-30-19	80.00		
	(5- 1-19 to 5-13-19	90.00		
	(5-14-19 to 7-10-19	75.00		
	(11-16-19 to 1-31-20	90.00	526.29	2-17-20
(e) 1 (Adj.)	1- 1-20 to 3-31-20	44.00	42.00	4-26-20
3	4- 1-20 to 6-30-20	44.00	132.00	
(f) 1 (Adj.)	1- 1-20 to 7-31-20	90.00	366.00	8- 7-20
(g) 4	8- 1-20 to 11-30-20	90.00	360.00	
(h) 1 (Adj.)	12-16-20 to 2- 1-21	44.00	65.28	4- 4-21
1 (Adj.)	4-16-23 to 4-30-23	44.00	22.00	5-18-23
88	5- 1-23 to 8-31-30	44.00	3,872.00	
1 (Adj.)	7- 3-30 to 8-31-30	69.00	48.39	9-11-30
2	9- 1-30 to 10-31-30	69.00	138.00	
1 (Adj.)	(9-27-30 to 10-16-30	91.00		
	(10-17-30 to 10-31-30	95.20	26.96	10-31-30
27	11- 1-30 to 1-31-33	95.20	2,570.40	
1 (Adj.)	12- 5-32 to 1-31-33	107.80	23.58	2- 7-33
5	2- 1-33 to 6-30-33	107.80	539.00	
9	7- 1-33 to 3-31-34	80.85	727.65	
(i) 1 (Adj.)	3-28-34 to 4-30-34	107.80	110.50	5- 7-34
11	5- 1-34 to 3-31-35	107.80	1,185.80	
1 (Adj.)	3-25-35 to 3-31-35	135.40	5.52	4- 8-35
23	4- 1-35 to 2-28-37	135.40	3,114.20	
1 (Adj.)	2-11-37 to 2-28-37	140.00	3.06	2-25-37
20	3- 1-37 to 10-31-38	140.00	2,800.00	
			\$16,872.66	
	Refunded (see "g")		45.00	
			\$16,827.66	

(a) Overpaid from 5-14-19 to 5-31-19 in amount of \$8.71.

(b) Overpayment liquidated.

(c) Award discontinued 7-10-19. No reason given.

Defendant's Exhibits.

(d) Includes payment of \$90.00 for January 1920, creating overpayment of \$46.00.

(e) Represents the amount due for months of February and March 1920 less amount overpaid for January 1920.

(f) Includes regular July 1920 payment.

(g) Award discontinued 11-14-20 for Vocational Training. See refund.

(h) Award discontinued 2-1-21 for Vocational Training.

(i) Includes regular April 1934 payment.

I hereby certify that the above statement is a true, correct and complete record of compensation payments as shown by the accounts of the Accounting Division.

(Signed) WM. H. HOLMES,

Chief, Accounting Division.

Government's Exhibit A-4

STATE OF VERMONT

MOTOR VEHICLE DEPARTMENT

OPERATOR'S LICENSE APPLICATION

1934

I hereby make application for motor vehicle operator's license and say, on oath, that my answers to the following questions are true.

1. Had previous license in Vermont? Yes.
2. Year last license was issued? 1933.
3. Where born? St. Johnsbury, Vt.
4. Age? 39. Date of birth? Apr. 4, 1895.
5. Present occupation? None.
6. Sex? Male. Height? 5½ ft. Weight? 170. Color of eyes? Blue.

Defendant's Exhibits.

7. Poll and flood taxes paid for 1933? Yes.
8. Operator's license or right to drive suspended or revoked in this or any other state? No.
9. Ever been afflicted with epilepsy, fits, vertigo, fainting spells or any other mental or physical infirmity? No.
10. Eyesight. Normal? Yes. Wear glasses? No.
11. Hearing. Normal? Yes. Slightly deaf? No.
12. P. O. Address, Box 145. Town or City? Hardwick, Vt.

LEROY A. BERRY.

STATE OF VERMONT, }
COUNTY OF CALEDONIA. } ss.:

On the 1 day of May 1934, personally appeared the above named applicant and made oath that the statements and answers in the above application by him subscribed are true.

Before me, A. C. BROWN,

Notary Public.

Government's Exhibit A-5

STATE OF VERMONT
MOTOR VEHICLE DEPARTMENT
MONTPELIER, VERMONT.

OPERATOR'S LICENSE APPLICATION
1939

Name, LeRoy A. Berry.

Mail To: Street, 29 Pearl St.

City, Brattleboro. State, Vt.

Defendant's Exhibits.

1. Age, 44. Date of Birth, Apr. 4, 1895. Height, 5 ft. 6 in. Weight, 172.
2. Sex, Male.
3. Where Born, St. Johnsbury, Vt.
4. Present Occupation, Retired.
5. Have you ever had a Vermont operator's license? Yes.
6. Year last Vt. license was issued? 1938.
7. Is your license or right to drive now suspended or revoked in this or in any other state? No.
8. Are you now required, by an order from this department, to file insurance before this license can be issued? No.
9. Have you any physical or mental infirmities, such as loss of an arm, fainting spells, imperfect eyesight, etc? Yes. If yes, what? Loss of left foot. Date of last professional treatment for same, Aug. 1938.

I, the undersigned, declare that I have paid all poll and old age assistance taxes for the previous year for which I am liable, hereby apply for an operator's license and certify that the statements herein are true.

LEROY A. BERRY.

STATE OF VERMONT
MOTOR VEHICLE DEPARTMENT
MONTPELIER, VERMONT

OPERATOR'S LICENSE APPLICATION

1938

Name, LeRoy Aylmer Berry.

Street, 95 Green St.

City, Brattleboro. State, Vt.

1. Age, 43. Date of Birth, Apr. 4, 1895. Height, 5-6. Weight, 174.

Defendant's Exhibits.

2. Sex, Male.
3. Where Born, St. Johnsbury, Vt.
4. Present Occupation, None.
5. Have you ever had a Vermont operator's license? Yes.
6. Year last license was issued? 1937.
7. Is your license or right to drive now suspended or revoked in this or any other state? No.
8. Are you now required, by an order from this department, to file insurance before this license can be issued? No.
9. Have you any physical or mental infirmities, such as loss of an arm, fainting spells, imperfect eyesight, etc? Yes. If yes, what? Loss of left foot. Date of last professional treatment for same, 1933.

I the undersigned declare that I have paid all poll and old age assistance taxes for the previous year for which I am liable, hereby apply for an operator's license and certify that the statements herein are true.

LEROY A. BERRY.

STATE OF VERMONT
MOTOR VEHICLE DEPARTMENT
MONTPELIER, VERMONT

OPERATOR'S LICENSE APPLICATION

1937

I hereby make application for motor vehicle operator's license and say, on oath, that my answers to the following questions are true.

Name, LeRoy A. Berry.

Address, Street No., Terrace Hill. Town or City, Hardwick.

1. Age, 41. Date of Birth, April 4, 1895. Height, 5 ft. 6 in. Weight, 160.

Defendant's Exhibits.

2. Sex, Male.
3. Where Born, St. Johnsbury, Vt.
4. Present Occupation, Filling station operator.
5. Have you ever had a Vermont operator's license? Yes.
6. Year last license was issued? 1936.
7. Were you a resident of Vermont April 1, 1936? Yes.
If resident, are 1936 Poll, Old Age Assistance, and Flood Taxes paid? Yes.
8. Is your license or right to drive now suspended or revoked in this or any other state? No.
9. Are you now required, by an order from this department, to file insurance before this license can be issued? No.
10. Have you any physical or mental infirmities, such as loss of an arm, fainting spells, imperfect eyesight, etc.? Yes. If yes, what? Loss of left foot. Date of last professional treatment for same, 1924.

LEROY A. BERRY.

STATE OF VERMONT, }
COUNTY OF CALEDONIA. } ss. :

On the 1 day of April 1937, personally appeared the above named applicant and made oath that the statements and answers in the above application by him subscribed are true.

Before me, C. H. WHITE,
Notary Public.

STATE OF VERMONT
MOTOR VEHICLE DEPARTMENT
MONTPELIER, VERMONT
OPERATOR'S LICENSE APPLICATION
1936

I hereby make application for motor vehicle operator's license and say, on oath, that my answers to the following questions are true.

Defendant's Exhibits.

Name, LeRoy A. Berry.

Address, Street No., Hillside Ave. Town or City, Hardwick.

1. Age, 40. Date of Birth, Apr. 4, 1895. Height, 5½ ft. Weight, 162.

2. Sex, Male.

3. Where Born, St. Johnsbury, Vt.

4. Present Occupation, Truckman.

5. Have you ever had a Vermont operator's license? Yes.

6. Year last license was issued? 1935.

7. Were you a resident of Vermont April 1, 1935? Yes.

If resident, are 1935 Poll, Old Age Assistance, and Flood Taxes paid? Yes.

8. Is your license or right to drive now suspended or revoked in this or any other state? No.

9. Are you now required, by an order from this department, to file insurance before this license can be issued? No.

10. Have you any physical or mental infirmities, such as loss of an arm, fainting spells, imperfect eyesight, etc.? Yes. If yes, what? Loss of left foot. Date of last professional treatment for same in 1920.

LEROY A. BERRY.

STATE OF VERMONT, }
COUNTY OF WASHINGTON } ss.:

On the 28 day of March 1936, personally appeared the above named applicant and made oath that the statements and answers in the above application by him subscribed are true.

Before me, CATHERINE LONIER,

Notary Public.

Defendant's Exhibits.

STATE OF VERMONT
 MOTOR VEHICLE DEPARTMENT
 MONTPELIER, VERMONT
 APPLICATION FOR TRUCK
 1936

I hereby say on oath, that I am the bona fide owner of the motor vehicle, described below, and that the following answers are true.

Name, LeRoy A. Berry.

Address, Street No., Hillside Ave. Town or City, Hardwick.

1. Make of Truck, Stewart.
2. Serial No., 29XS-711.
3. Motor No., ASD-1725.
4. Mfg. Rated Cap., 2 ton.
5. Year of Mfg., 1932.
6. Weight, 6,690. Heaviest net load to be carried, 10,000. Total, 16,690.
7. Motive power, Gasoline.
8. From whom purchased, J. Leo Johnson, Montpelier, Vt.
10. Are you now required, by an order from this department, to file insurance before this registration can be issued? No.

LEROY A. BERRY.

STATE OF VERMONT, }
 COUNTY OF WASHINGTON } ss.:

On the 28 day of March 1936, personally appeared the above named applicant and made oath that the statements and answers in the above application by him subscribed are true.

Before me, CATHERINE LONIER,

Notary Public.

*Defendant's Exhibits.*STATE OF VERMONT
OFFICE OF COMMISSIONER OF MOTOR VEHICLES

I hereby certify that the foregoing is a true copy of all records relative to licenses and registrations of motor vehicles issued to Leroy A. Berry, formerly of Hardwick, Vermont, from 1919 to 1939, inclusive.

Operators:

- 1919—No license found.
- 1920—Professional License No. 5108.
- 1921—Professional License No. 3064.
- 1922—Professional License No. 5634.
- 1923—Professional License No. 2694.
- 1924—Professional License No. 3476.
- 1925—Professional License No. 9056.
- 1926—Professional License No. 13646.
- 1927—Professional License No. 13537.
- 1928—License No. 81805.
- 1929—License No. 29305.
- 1930—License No. 52304.
- 1931—License No. 47476.
- 1932—License No. 38389.
- 1933—License No. 61933.
- 1934—License No. 70713.
- 1935—License No. 63156.
- 1936—License No. 26287.
- 1937—License No. 29017.
- 1938—License No. 87982.
- 1939—License No. 85087.

Registrations:

- 1919—No registration issued.
- 1920—Registration No. 29140—Saxon Touring.

Defendant's Exhibits.

- 1921—Registration No. 26537—Chevrolet Roadster.
- 1922—Registration No. 29015—Dodge Touring.
- 1923—Registration No. 44719—Ford Touring.
- 1924—Registration No. 9920—Chevrolet Touring.
- 1925—Registration No. 51589—Chevrolet Touring.
- 1926—No registration issued.
- 1927—Registration No. 38083—Dodge Touring.
- 1928—Registration No. 71476—Dodge Touring.
- 1929—No registration issued.
- 1930—Registration No. 37089—Dodge Sedan.
- 1931—Registration No. 34027—Chrysler Coach—Transfer
to Plymouth Sedan.
- 1932—No registration issued.
- 1933—No registration issued.
- 1934—No registration issued.
- 1935—No registration issued.
- 1936—Registration X2115—Stewart truck.
- 1937—No registration issued.
- 1938—No registration issued.
- 1939—No registration issued.

Photographic copies of applications for registration for 1936 and photographic copies of applications for licenses for 1936, 1937, 1938 and 1939 are attached hereto, as appears on the original records and files in this office.

In testimony whereof, I have hereunto set my hand at Montpelier, this fifteenth day of May, A. D., 1939.

M. A. CAMPBELL,

Commissioner of Motor Vehicles.

*Defendant's Exhibits.***Defendant's Exhibit B**

Jan. 12, 1920.

Mr. Leroy A. Berry,
Sheffield, Vt.

Dear Sir:

This is to inform you that we have located employment for you in photography, at the Marceau Studio, 160A Tremont St., Boston, providing you feel capable of successfully doing retouching. Mr. Stearn of this studio says that he will give you a tryout at this work for perhaps a half a day or so, and if you are able to successfully performing the work he will give you \$25.00 per week to start, and says that if you have the ability, you will be able, in a short time, to receive \$40.00 or \$50.00 per week.

I am enclosing transportation request covering your passage from Sheffield, Vt., to Boston, and if you care to accept this position, kindly report to the Placement Office, Room 1228, at once. Otherwise kindly return the enclosed transportation request.

Very truly yours,

M. R. SPINNEY,

Placement Supervisor.

P. S. If you decide to accept this opportunity kindly report to this office ready for work.

Defendant's Exhibit C

Sheffield, Vt., Jan. 22, '20.

Placement Dept.,

Federal Board for Vocational Education.

Dear Sirs:

Received transportation to Boston for purpose of employ-

Defendant's Exhibits.

ment. Finding that I cannot accept the position, I am returning said transportation to you as requested.

Yours truly,

LEROY A. BERRY.
Sheffield, Vt.

Defendant's Exhibit D

FEDERAL BOARD FOR VOCATIONAL EDUCATION
1201 LITTLE BUILDING, BOSTON, MASS.

PLACEMENT INFORMATION

Having completed my course in Photography, I now desire a position either permanent, or in placement training. If you can secure same for me,

I will be greatly obliged,

LEROY A. BERRY,
Sheffield, Vermont.

Defendant's Exhibit E

APPLICATION OF PERSON DISABLED IN AND DISCHARGED FROM SERVICE

1. Full name, LeRoy Aylmer Berry.
2. Address, Sheffield, Vt. .
3. Under what name did you serve? LeRoy Aylmer Berry.
- (a) Serial No. 67902.
4. Color, White. Date of birth, Apr. 4, 1895. Place of birth, St. Johnsbury, Vt.

Defendant's Exhibits.

5. Make a cross (X) after branches of service you served in: General Service, X. Army, X.
6. Date you last entered service, July 1, 1917. Place of entry, St. Johnsbury, Vt.
7. Rank or rating at time of discharge, Private.
8. Company and regiment or organization, vessel, or station in which or on which you last served, Co. E, 103rd Inf., 26th Division.
9. Date and place of last discharge, Jan. 2, 1919 (S. K. S.), Camp Devens, Mass.
10. Cause of discharge, Demobilization.
11. Nature and extent of disability claimed, Amputated left leg.
12. Date disability began, June 16, 1918.
13. Cause of disability, Wounded by fragment of high explosive shell.
14. When and where received, June 16, 1918, Toul Sector, France.
15. Occupations and wages before entering service, Photographer, \$25 per wk.; Farmer, \$40, board and room.
16. Last two employers: Darwin Houghton, St. Johnsbury, Vt., 7 months.
17. Occupations since discharge, dates of each, and wages received; if less than before service, why? None.
18. Present employer, None.
19. Name and address of doctor or hospital treating you, Evacuation Hospital No. 1, Toul Sector, France; Base Hospital No. 66, Neuf Chateau, France; General Hospital No. 3, Rahway, N. J.
20. Are you confined to bed? No. Do you require constant nursing or attendance? No.
21. Name and address of nurse or attendant, None.

Defendant's Exhibits.

22. Are you willing to accept medical or surgical treatment if furnished? Yes.

23. Are you single, married, widowed, or divorced? Single.

29. Have you now living a child or children, including step-children and adopted children, under eighteen years of age and unmarried? No.

31. Have you a child of any age who is insane, idiotic, or otherwise permanently helpless? No.

32. State whether your parents are living together, separated, divorced, or dead? Both dead.

37. Did you make an allotment of your pay? Yes.

38. If so, to whom? Raymond L. Berry. Amount \$15.

39. Give number of any other claim filed on account of this disability, and place filed. This is the first claim filed.

40. Did you apply for War Risk Insurance? Yes.

41. When and where? Jan. 1918, Lifoll Legrande, France.

43. Name of beneficiary, Raymond L. Berry, Winona Berry.

I make the foregoing statements as a part of my claim with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for compensation or insurance.

LEROY AYLMEY BERRY.

Subscribed and sworn to before me this 6th day of January, 1919, by LeRoy Aylmer Berry, claimant, to whom the statements herein were fully made known and explained.

ROLLAND A. DUNN,
Notary Public.

*Defendant's Exhibits.***Defendant's Exhibit F**

NATIONAL UNION INDEMNITY CO.
PITTSBURGH, PENNSYLVANIA
APPLICATION FOR FIDELITY BOND

Application is hereby made to National Union Indemnity Company to become surety on my bond, for Two Hundred dollars, (\$200.00) effective February 14, 1930, in favor of The Aluminum Cooking Utensil Co., employer, in my position as Salesman at Lyndonville, County of Caledonia, State of Vermont and I hereby affirm that the following declarations made and answers given are true without any exception or reservation whatsoever.

1. What is your full name? Leroy Aylmer Berry. Nationality? American. Race? American. Color? White.

2. Where and when were you born? Place, St. Johnsbury, Vt. Date, April 4th, 1895.

3. How long have you been a resident of the United States? Since Birth.

4. Of what country are you now a citizen? U. S.

5. Where do you reside? Elm Street, Lyndonville, Vermont. How long have you resided there? From May 1928.

6. Are you married? Yes. Number of children? Four. How many self-supporting and live apart from you? None. How many with and supported by you? Four. If other persons depend upon you for support, give names and relationship. None.

Full name and address of your wife, Fatima Arabelle Berry, Lyndonville, Vermont.

7. How long have you been in the service of the employer requiring this bond? Just starting.

8. What is the nature of your employer's business and where is it located? The Aluminum Cooking Utensil Co., New Kensington, Penna.

Defendant's Exhibits.

9. State what salary or other compensation you receive and how and when paid. Commission, payable semi-monthly. What allowances or deductions, if any? None.

10. Have you any other income? Yes. If so, state source and amount thereof. U. S. Veteran's Compensation, \$4000 monthly.

11. Do you own any real estate? No. Do you own any personal property? Yes. If so, what does it consist of and what is its value? Auto \$200.00, Machine Tools \$450.00, Household Furniture \$500.00.

12. Have you any debts or other liabilities? Yes. If so, for what amount? \$450.00. Give full particulars, Doctor and Hospital Bills. Are you endorser or surety for anyone? No.

13. If you are engaged in or have any interest in any business other than that in connection with which you are now making application for bond, describe fully its nature and location and the nature of your connection therewith and if a partnership, state name and address of partner. None.

14. Have you ever been bankrupt or insolvent? No.

15. Have you ever been in arrears or default in your present or any previous employment? No.

16. When and by whom were your accounts last examined, and were they found correct? No examination, no accounts.

17. Have you ever been discharged from any position or employment? No.

18. Have you ever applied to any other source for the bond for which you are now making application? No.

19. Has your application for any bond ever been declined at any time, or have you ever made application without receiving the bond applied for? No.

20. If your life is insured, state for what amount, for whose benefit, and in what company. \$2000.00, Metropolitan Life Insurance Co. Wife.

Defendant's Exhibits.

21. State your habits, past and present, as to the use of intoxicants, if any. None.

22. Do you ever gamble in any form or speculate in stocks or otherwise? No.

23. State whether you have furnished any other bond or security to your present employer, and if so, state its nature and amount. No.

24. Please give below, a statement of all your past employments or occupations during the ten years last past, or since you finished school. If unemployed for any portion of that period, state how and where the time was spent, whether ill or on vacation or otherwise as the case may be, and give the name and address of one or more references who can verify your statement. This employment record must be given accurately and the entire period above mentioned must be covered without any lapse, omission, or break in the record and without leaving any time unaccounted for between employments. Feb. 1920 to Nov. 1922, Mechanic, St. Johnsbury, W. A. Wright, Corner Garage, Inc., St. Johnsbury, Vt. Nov. 1922 to Jan. 1924, Mechanic, St. Johnsbury, L. C. Benoit, St. Johnsbury Garage, St. Johnsbury, Vt. Jan. 1924 to May 1928, Prop., Sheffield, Vt., Berry Garage, Sheffield, Vt. May 1928 to Jan. 1929, Mechanic, Lyndonville, Vt., J. E. Nadeau, Depot Garage, Lyndonville, Vt. Jan. 1929 to Jan. 1930, Prop., Lyndonville, Vt., South End Garage, Lyndonville, Vt. Jan. 1930 to Feb. 1930, Salesman, Lyndonville, Vt., L. D. Ratta, Air-Ways, Inc., Manchester, N. H.

25. Please give information respecting parents and nearest relatives as follows: Name of Father, Deceased. Name of Mother, Deceased. Names and addresses of brothers and sisters, R. L. Berry, Sheffield, Vermont; R. Berry Menut, Oakland St., Albany, N. Y. Other near relatives and their addresses, Mrs. L. V. Menut, Lyndonville, Vt.; George Gilman, Lyndonville, Vermont.

Defendant's Exhibits.

26. Please give below the names and addresses of persons, not less than five, of intelligence and good standing, householders if possible, for referees, who have a personal acquaintance with you, and who are not related to you. In no case, however, should a person be named who is a partner, or one of the firm or an officer of the employer in whose favor the bond herein applied for is to be made. 1. J. D. Dexter, Jeweler, Lyndonville, Vermont. 2. S. S. McDowell, Hotel Owner, Lyndonville, Vermont. 3. I. F. Webber, Garage, Lyndonville, Vermont. 4. E. A. Lawson, Farmer, Lyndonville, Vermont. 5. J. F. Puffer, Bank Cashier, St. Johnsbury, Vermont.

In Witness Whereof, I have hereunto set my hand and seal this 14th day of February, 1930.

LEROY A. BERRY,

Elm Street, Lyndonville, Vermont.

Signed in the presence of Arthur Dixon, witness.

PERSONAL DESCRIPTION OF APPLICANT

Apparent age, 35; Height, 5 ft. 6 in.; Weight, 170; Complexion, Light; Color of Eyes, Blue; Color of Hair, Light; Color of Mustache, None; Color of Beard, None; Sex, Male; Religion, Protestant.

EMPLOYER'S CERTIFICATE

Date, February 14th, 1930.

I have read the foregoing declarations and answers made by LeRay A. Berry and believe them to be true.

ARTHUR DIXON,

On behalf of The Aluminum Cooking Utensil Co.

*Defendant's Exhibits.***Defendant's Exhibit G**

1. Full name of Person whose life is to be insured. LeRoy A. Berry.
2. Residence, Sheffield, Vt. How long have you resided at this address? 4 years.
3. Place of birth, St. Johnsbury, Vt.
4. Date of birth, April 4, 1895. Age nearest birthday? 33 years.
5. Single, Married, Widower or Widow? Married.
6. Occupation? Auto Mechanic. Nature of Employer's business? Repair Shop.
7. Exact duties of Occupation. Repairing cars.
8. Any change in Occupation contemplated? No.
9. Place of Business. Lyndonville, Vt. By whom employed? J. E. Nadeau.
10. Former Occupations. Farming & Same.
11. Do you, within the next twelve months, contemplate journeying outside the United States or Canada or making an ocean trip? No.
12. Have you any intention of making aerial flights within the next two years? No.
13. Have you any other application or negotiation for life, accident, or health insurance now pending or contemplated? No.
14. Amount of Insurance desired. \$2000 Intermediate. Prem. Payable, Monthly.
15. Plan of Insurance as designated in Rate Book. 20 Payment Life.
16. (a) Beneficiary in case of your death. Fatima C. Berry. Relationship of Proposed Beneficiary, Wife. Occupation, Housewife. Age, 26. P. O. Address, Sheffield, Vt. (b) Do you reserve the right to change the Beneficiary at any time without the consent of Beneficiary herein designated? Yes!

Defendant's Exhibits.

17. Is any one entirely dependent on you for support? Wife and four children.

18. Are you now insured in this or any other Company? None.

20. Is the policy for which you are hereby applying intended to take the place of insurance carried with this or any other Company? No.

21. What amount have you paid in advance on account of the first premium? \$6.08.

23. Have you ever applied to any Company or Association without receiving Insurance in the amount or on the plan applied for, or at your actual age, or at the normal premium therefor? No.

Signed by Applicant and dated at Lyndonville, Vt. this 10th day of August, 1928.

Witness to Signature, A. B. Goslant. Signature of Applicant, LeRoy A. Berry.

1. Have you within the last twelve months applied to any other Insurance Company for insurance without medical examination? No.

2. What is your height? 5 ft. 6½ in.

3. (a) What is your weight? 156 pounds. (b) Date when last weighed, few weeks.

4. (a) Change in weight in last two years. Decrease, No. Increase, No.

5. What are your measurements? Chest, 35 inches. Waist, 35 inches.

6. Present condition of health? Good.

7. (a) When last sick? Flue, 1918. (b) Nature of last sickness? Good recovery. (c) How long sick? Few days.

8. Have you ever changed your residence or left your work for more than one month on account of your health? No.

9. Any physical or mental defect or infirmity? No.

10. Any impairment of sight or hearing? No.

Defendant's Exhibits.

11. Have you had any surgical operation, serious illness or accident? Operated for appendicitis Apr. 1928.

12. Are you ruptured? No.

13. Have you ever been told there was albumin, sugar, or casts in your urine? No.

14. Have you ever taken Insulin treatment? No.

15. Have you ever been told that you had any heart trouble? No.

16. Name and address of your usual medical attendant? Dr. Herrick, West Burke.

17. Have you ever had any of the following complaints or diseases? Apoplexy, Appendicitis, Asthma, Bronchitis, Cancer or other Tumor, Consumption, Diabetes, Disease of Heart, Disease of Kidneys, Disease of Liver, Disease of Lungs, Fistula, Fits or Convulsions, Goitre, Habitual Cough, Insanity, Colic, Jaundice, Paralysis, Pleurisy, Pneumonia, Rheumatism, Scrofula, Syphilis, Spinal Disease, Spitting of Blood, Varicose Veins. If yes, give particulars, dates and duration. Had Pneumonia 1916, good recovery.

18. Have you been attended by a physician during the last five years? Yes, for the appendicitis before the operation.

19. Have you had any treatment within the last five years at any dispensary, hospital or sanatorium? Yes as above.

20. How much time have you lost from work through illness during the last five years? Few weeks as above.

21. Have you ever used opium, chloral, cocaine, or other narcotics? No.

22. (a) To what extent do you use beer, wine, or other alcoholic beverages? None. (b) Have you ever used any of them to excess? No.

23. Are you now, or have you ever been, engaged in the manufacture or sale of malt or alcoholic liquors? No.

24. Have you during the past year resided or been intimately associated with any person suffering from consumption? No.

Defendant's Exhibits.

25. Has any one of your parents, brothers or sisters now or ever had, tuberculosis, cancer, diabetes, epilepsy, insanity or any hereditary disease? No.

26. Family Record: Father dead, age at death 40, killed in the woods 1906. Mother, dead, age at death 27, Septicemia child birth, 1897. Brothers, 2, age 39 and 31, both in good health. Sister, age 37, good health.

I Hereby Certify that I have read the answers to the questions in Part A hereof and to the questions in Part B hereof, before signing, and that they have been correctly written, as given by me, and that they are full, true and complete, and that there are no exceptions to any such answers other than as stated herein.

Dated at Lyndonville, Vt., this 7th day of September, 1928

Witness to Signature, F. H. Davis. Signature of Applicant
LeRoy A. Berry.

MEDICAL EXAMINATION

Witness to Signature, F. H. Davis, M.D.

Signature of Applicant, LeRoy A. Berry.

Medical examiner's report on LeRoy Berry.

1. Race? White.
2. Occupation? Auto Mechanic.
3. Anything insanitary or hazardous in the occupation, or in the residence or place of business? No.
4. (a) Age nearest birthday as given by Applicant? 33.
(b) Apparent age? Same.
5. General appearance as to health? Good.
6. Is there any lameness, deformity or loss of limb? Yes
left leg is (amputated) war below the knee.
7. Is there any evidence of industrial poisoning or occupational disease? No.
8. Rate, rhythm and other qualities of pulse? 80. Full strong and regular.

Defendant's Exhibits.

9. Height? 5 feet 6½ inches.
10. Weight? 156 pounds.
11. Measurements under waistcoat. (a) Chest at full inspiration? 38½ inches.
12. (a) Is Applicant ruptured? No.
13. Does thorough physical examination and inquiry show any evidence of disease or impairment (a) Of the Brain or Nervous system? No. (b) Of the Circulatory system? No. (c) Of the Respiratory system? No. (d) Of the Liver, Stomach, Intestines? No. (e) Of the Skin, Glands, Thyroid? No. (f) Of the Ears? No. Of the Eyes? No. (g) Of the Genito-Urinary Organs? No.

16. Are you aware of intemperance or any other circumstance connected with the Applicant, not herein recorded, which the Company ought to know? No.

17. (a) Do you consider the Applicant as first-class, average, or poor? 1st Class.

I Herby Declare that I have carefully examined the above named Applicant with the results herein recorded.

Dated at Lyndonville, Vt., this 7th day of Sept., 1928.

F. H. Davis, Medical Examiner. Sheffield, Vt., Residence.

REPORT OF INSPECTION

1. Advance payment of \$6.08. Is this amount the full first premium? Yes.

2. (a) Is Applicant related to you by blood or marriage? No. (b) Have you any direct or indirect interest as beneficiary in the proposed insurance? No.

3. When and where have you seen the Applicant? At Garage.

4. How long have you known the Applicant? 5 years.

5. How long has Applicant been in his present place of employment? 1 year.

Defendant's Exhibits.

6. How much time has Applicant lost during past year from ill-health? Three weeks, operation for appendix.

7. (a) Sex? Male. (b) Are sight and hearing good? Yes.

8. (a) Does Applicant appear older than age given? No. (b) Do you believe Applicant is in good health? Yes.

9. From whose earnings will premiums be paid? LeRoy Berry.

10. Is Non-Medical Industrial insurance also being applied for? No.

11. Are the character of home surroundings and the general position in life equal to or better than those of the usual high grade mechanic? Better.

12. What does careful inquiry of disinterested and responsible persons disclose as to moral character, past and present habits of Applicant? Good.

13. (a) Give number of any Ordinary, Intermediate Industrial policy lapsed within six months or to be lapsed within six months. None.

14. Will any insurance now in force or application pending elsewhere be discontinued if the policy applied for is issued? No.

15. Race? White.

I believe that the statements and answers in the application are true and recommend the risk.

A. B. GOSLANT.

Date, Aug. 10, 1928.

*Defendant's Exhibits.***Defendant's Exhibit H**

STATISTICAL REPORT FOR TRAINING STATISTICS SECTION,
CENTRAL OFFICE, WASHINGTON, D. C.

Name, Berry, Leroy Aylmer, No. Railroad St., St. Johnsbury, Vt. Dist No. One. Date of this report, March 22, 1924.

C No. 114 614. R-No. 1-13039. Race, W. Nationality, American.

Rank and branch of service, Pvt., Co. E, 103d Inf.

Place of service, France.

Date of birth, April 4, 1895. Marital status: Married, X;
No. dependents, 2.

Education prior to training, Grad. 9th Grade, 15 mos. Ill. Photo College.

Major occupation prior to training, Photographer.

Location, St. Johnsbury, Vt. Wages, \$30.00 per week.

Pre-war address, Sheffield, Vt.

Objectives: 1. Photographer; Sec. Two; Institutional; from 5-14-19 to 9-10-19; 3¾ months; New York. Inst. of Photography, New York, N. Y.; supplies and transportation omitted, G. O. 212. 2. Auto Mechanic; Sec. Two; Institutional; from 9-10-19 to 11-15-19; 2¼ months; Ill. Col. of Photo., Effingham, Ill. 3. Auto Mechanic; Sec. Two; Placement; from 11-15-20 to 12-15-20; 1 month; Thoerson's Garage, St. Johnsbury, Vt. 4. Auto Mechanic; Sec. Two; Placement; from 2-2-21 to 5-2-21; 3 months; Lyndon Auto Sales Co., Lyndonville, Vt. 5. Auto Mechanic; Sec. Two; Placement; from 5-2-21 to 7-12-21; 2¼ months; Morrill's Garage, Danville, Vt. 6. Auto Mechanic; Sec. Two; Placement; from 7-12-21 to 10-31-22; 15½ months; Corner Garage Inc., St. Johnsbury, Vt. 7. Auto Mechanic; Sec. Two; Placement; from 10-31-22 to 4-15-23; 5½ months; St. Johnsbury Garage, St. Johnsbury, Vt.

Defendant's Exhibits.

Duration of training: Years, 2; months, 9½.

Check status: × Rehabilitated, April 15, 1923.

State specifically nature of employment during follow-up period: Auto Mechanic.

Wages received, \$27.00 per wk.

Employer's name, Running Garage for himself. Address, St. Johnsbury, Vt.

Physical disability, Amputation left foot.

Causes, Was hit by high explosive shell on June 16, 1918.

Signed, ALLEN FLETCHER,

Subdistrict Manager.

At Burlington, Vt.

Certified by R. E. MACLEOD,

For District Manager.

At Boston, Mass.

Eligibility established—4-18-19—C. L. 205.

Copy of letter dated 7-2-1919, by Dr. Nathan A. Goldstein, A.A.S., U.S.P.H.S., Broadway, New York, is attached hereto:

SUPERVISION RECORD

Date, Jan. 12, '21. D No. 834.

Name of trainee, Berry, Leroy A.

Present address, 4 Duke St., St. Johnsbury, Vt.

Employment objective, Auto mechanic.

Place of training, Adams & Drown Garage, Lyndonville, Vt.

Counselor, Mr. Adams.

The undersigned has this date visited above-named man.

2. What adjustment has been made? I made arrangements with above firm for man to start training. Man insists he wants this training even with part of his leg off.

Defendant's Exhibits.

10. Did you interview man in person on this visit? Yes.
11. What should be date of next visit to man? Feb. 1, 1921.

(Signed) JAMES W. MUIRHEAD,
Officer Supervising Training.

SUPERVISION RECORD

Date, Feb. 28, '21. D No. 834.

Name of trainee, Berry, Leroy H.

Present address, Lyndonville, Vt.

Employment objective, Auto mechanic.

Place of training, Lyndon Auto Sales Co., Lyndonville, Vt.

Counselor, Mr. Drown.

The undersigned has this date visited above-named man.

1. Is training satisfactory? Yes.
4. What was he doing on this visit? Repairing.
5. Opinion of Counselor on progress. Good.
6. Training hours per day, 9.
7. Has training been interrupted? No.
9. Time lost, None from Feb. 2, 1921 to Feb. 28, 1921.
10. Did you interview man in person on this visit? Yes.
11. What should be date of next visit to man? March, 1921.

(Signed) JAMES W. MUIRHEAD,
Officer Supervising Training.

SUPERVISION RECORD

Date, March, 29, '21. D No. 834.

Name of trainee, Berry, Leroy H.

Present address, St. Johnsbury, Vt.

Employment objective, Auto mechanic.

Place of training, Lyndon Auto Sales Co., Lyndonville, Vt.

Counselor, Mr. Drown.

Defendant's Exhibits.

The undersigned has this date visited above-named man.

1. Is training satisfactory? Yes.
3. On what work was man engaged on last visit? Repairing cars.
4. What was he doing on this visit? Working on engines good opportunity.
5. Opinion of Counselor on progress. Very good.
6. Training hours per day, 9.
7. Has training been interrupted? Yes. Why? Man had to go to Boston and have his leg attended to.
9. Time lost, 2 days, from Feb. 28, 1921 to March 29, 1921.
10. Did you interview man in person on this visit? Yes.
11. What should be date of next visit to man? April 30, '21.

(Signed) JAMES W. MUIRHEAD,
Officer Supervising Training.

SUPERVISION RECORD

Date, April 26, '21. D No. 834.

Name of trainee, Berry Leroy H.

Present address, St. Johnsbury.

Employment objective, Auto mechanic.

Place of training, Drown's Garage, Lyndonville, Vt.

Counselor, Mr. Drown.

The undersigned has this date visited above-named man.

1. Is training satisfactory? Yes.
2. What adjustment has been made? Man left place of training because the Foreman Mr. Smith's wife and trainee's wife had a fight and Mr. Smith would not forget it. So trainee's opportunity was gone with the above firm. Arrangements were completed by me today for trainee to re-enter training as auto mechanic with Morrill's Garage, Danville, Vt., on May 2, '21.

Defendant's Exhibits.

5. Opinion of Counselor on progress. Very good.
6. Payments to man by firm, if any; \$10.00 per week. Training hours per day, 9.
7. Has training been interrupted? Yes. Why? Had to quit.
8. If absent on date of present visit, give last date of attendance April 19, 1921.
9. Time lost, 6 days, from March 29, 1921 to April 26, 1921.
10. Did you interview man in person on this visit? Yes.
11. What should be date of next visit to man? May 29, '21.

(Signed) JAMES W. MUIRHEAD,
Officer Supervising Training.

SUPERVISION RECORD

- Date, 7/16/21. D No. 834.
 Name of trainee, Berry, Leroy Hylner.
 Present address, 4 Duke St., St. Johnsbury, Vt.
 Employment objective, Auto mechanic.
 Place of training, Wright's Garage.
 Counselor, Mr. Wright, Cor. Portland and Railroad Sts.
 The undersigned has this date visited above-named man.
1. Is training satisfactory? Yes.
 2. What adjustment has been made? Morrill's Garage has changed hands and now called Danville Garage. This man was laid off on July 8, 1921. Started in above shop Tues., July, 11, 1921.
 3. On what work was man engaged on last visit? Overhauling engine.
 4. What was he doing on this visit? Overhauling engine in Ford.

Defendant's Exhibits.

5. Opinion of Counselor on progress. Hasn't had much chance to observe as yet.

6. Payments to man by firm, if any, \$2.50 per day. Training hours per day, 9.

7. Has training been interrupted? Yes? Why? To change shops.

9. Time lost, 2 days, from 5/23/21 to 7/16/21.

10. Did you interview man in person on this visit? Yes.

11. What should be date of next visit to man? 8/27/21.

(Signed) J. B. CUMMINGS,

Officer Supervising Training.

SUPERVISION RECORD

Date, 8/23/21. D No. 834.

Name of trainee, Berry, Leroy Hylmer.

Present address, 4 Duke St., St. Johnsbury, Vt.

Employment objective, Auto mechanic.

Place of training, Wright's Garage, St. Johnsbury, Vt.

The undersigned has this date visited above-named man.

1. Is training satisfactory? Yes.

2. What adjustment has been made? Foreman will talk money matters over with Berry. Cannot keep him all winter and continue to pay him \$2.50 a day as he has a steady gang. Will keep Berry if money is lowered. Advised Berry to accept.

3. On what work was man engaged on last visit? Working on Ford Car.

4. What was he doing on this visit? Met me on street. Visited garage and talked with foreman.

5. Opinion of Counselor on progress. Good.

6. Payments to man by firm, if any, \$2.50 per day. Training hours per day, 9.

7. Has training been interrupted? No.

Defendant's Exhibits.

9. Time lost. None, from 7/16/21 to 8/22/21.
10. Did you interview man in person on this visit? Yes.
11. What should be date of next visit to man? 9/22/21.

(Signed) J. B. CUMMINGS,
Officer Supervising Training.

SUPERVISION RECORD

Date, Oct. 8, 1921. D No. 834.

Name of trainee, Berry, Leroy H.

New present address, 8 Charles St., St. Johnsbury, Vt.

Employment objective, Auto mechanic.

Place of training, Corner Garage, St. Johnsbury, Vt.

Counselor, Mr. Wright.

The undersigned has this date visited above-named man.

1. Is training satisfactory? Yes.
2. What adjustment has been made? Gave man dependency form for child born last May.
3. On what work was man engaged on last visit? Out on job.
4. What was he doing on this visit? Repairing car.
5. Opinion of Counselor on progress. Good.
6. Payments to man by firm, if any, \$1 per day. Cut from \$2.50.
7. Will be kept all winter. Training hours per day, 9.
8. Has training been interrupted? Yes. Why? Sick with flu or grip. Out 1½ weeks. Back 3 weeks ago.
9. Time lost, 10 days. From 8/22/1921 to 10/8/1921.
10. Did you interview man in person on this visit? Yes.
11. What should be date of next visit? 11/15/21.

(Signed) J. B. CUMMINGS,
Officer Supervising Training.

Defendant's Exhibits.

INFORMATION SHEET

From: Local Supervisor, Rehabilitation Division, U. S. Veterans Bureau, 127 St. Paul St., Burlington, Vt.

To: Training Agencies. C No. — D1-834.

Name of trainee, Berry, Leroy Hylmer.

Employment objective. Auto mechanic.

Place of training, Wright's Corner Garage, St. Johnsbury, Vermont.

Progress made, Good.

Training hours per day, 9 hrs.

Payments by firm, \$1.00 a day.

Is trainee fitted for course? Yes.

Conduct of trainee, Good.

Workmanship of trainee, good.

Attendance of trainee, Fair (has been sick quite a little).

In your opinion will trainee be able to carry on successfully after training is completed? Unable to state not knowing length of training allowed.

Name of Counselor, Corner Garage, Inc., by W. A. Wright.

Date, November 8, 1921.

Remarks: During the summer months we paid trainee \$2.50 a day, during which time he was here practically all the time. However about a month and a half ago, the summer rush being over, and the need of the services of trainee were considerably lessened, the above mentioned rate of \$1.00 a day was agreed upon. Since this time his attendance has dropped off, averaging the past few weeks not over two-thirds of time each week.

Returned to garage today and found trainee had been out Mon. and Tues. Left word if he was sick to notify office. If not to be on job every day and asked clerk to make check of trainee's time put in for month.

Explained last question to Mr. Wright. J. B. C.

Defendant's Exhibits.

SUPERVISION RECORD

Date, Dec. 9, '21. D No. 834.

Name of trainee, Berry, Leroy Hylmer.

Present address, 8 Charles St., St. Johnsbury, Vt.

Employment objective, Auto mechanic.

Place of training, Corner Garage, St. Johnsbury, Vt.

The undersigned has this date visited above-named man.

1. Is training satisfactory? See No. 2.
2. What adjustment has been made? Man was out about 2 weeks since last follow-up. He claims he injured his knee on his amputated leg but had no doctor. Instructed man to notify our office in future. Send man letter in regard to this absence.
3. On what work was man engaged on last visit? Overhauling car.
4. What was he doing on this visit? Repairing clutch on Dodge car.
5. Opinion of Counselor on progress. Good.
6. Payments to man by firm, if any. Pay cut per day. Training hours per day, 9 hrs.
7. Has training been interrupted? Yes. Why? See No. 2.
8. Time lost, 12 days, from 11/6/21, to 12/9/21.
9. Did you interview man in person on this visit? Yes.
10. What should be date of next visit to man? 1/17/22.

(Signed) J. T. KELLEY,

Officer Supervising Training.

SUPERVISION RECORD

Date, Jan. 9/22. D No. 834.

Name of trainee, Berry, Leroy Hylmer.

Present address, 8 Charles St., St. Johnsbury, Vt.

Employment objective, Auto mechanic.

Place of training, Wright's Garage, St. Johnsbury, Vt.

Defendant's Exhibits.

Counselor, Mr. Barney.

The undersigned has this date visited above-named man.

1. Is training satisfactory? Yes.
2. What adjustment has been made? Man was out from Dec. 21 until today. Had abscess on stump of amputated leg and was operated upon by Dr. Tierney. He was also ordered to Boston last week and measured for new artificial leg. I understand man notified office and also Dr. Tierney of reason for man's absence.

There hasn't been a follow-up on this man since last July 1921 but what shows he has lost some time. On my Dec. 1921 follow-up he lost 12 days through sickness and on this follow-up I find he has lost 15 more which was no doubt unavoidable due to the condition of his leg. However I suggest you write to him stating that while we sympathize with him in his recent trouble with his leg call his attention to the great amount of time he has lost in past 6 mos. and request that in future he keep on job as much as possible.

Also see about man's tools. He sent in list three months ago he states and has failed to hear anything about it.

3. On what work was man engaged on last visit? Relining clutch on Dodge car.
4. What was he doing on this visit? Working on Ford sedan.
5. Opinion of Counselor on progress. Good.
6. Payments to man by firm, if any, \$1 per day. Training hours per day, 9 hrs.
7. Has training been interrupted? Yes. Why? See No. 2.
9. Time lost, 15 days, from 12/9/21 to 1/9/22.
10. Did you interview man in person on this visit? Yes.
11. What should be date of next visit to man? 2/15/22.

(Signed) J. T. KELLEY,

Officer Supervising Training.

Defendant's Exhibits.

SUPERVISION RECORD

Date, 2/6/22. D No. 834.

Name of trainee, Berry, Leroy Hylmer.

Present address, 8 Charles St., St. Johnsbury, Vt.

Employment objective, Auto mechanic.

Place of training, Wright's Garage, St. Johnsbury, Vt.

Counselor, Mr. Barney.

The undersigned has this date visited above-named man.

1. Is training satisfactory? Yes.
2. What adjustment has been made? Man has not received tools as yet. As the Boston office was supposed to again take care of these matters after Feb. 1, 1922, kindly take up this affair with them.
3. On what work was man engaged on last visit? Repairing Ford sedan.
4. What was he doing on this visit? Working on Overland motor.
5. Opinion of Counselor on progress. Good.
6. Payments to man by firm, if any, \$1 per day. Training hours per day, 9 hrs.
7. Has training been interrupted? No.
9. Time lost, 3 days, from 1/9/22, to 2/6/22.
10. Did you interview man in person on this visit? Yes.
11. What should be date of next visit to man? 3/10/22.

(Signed) J. T. KELLEY,
Officer Supervising Training.

SUPERVISION RECORD

Date, 3/14/22. D No. 834.

Name of trainee, Berry, Leroy Hylmer.

Present address, 36 Clarks Ave., St. Johnsbury, Vt.

Defendant's Exhibits.

Disability, High Expl. shell, amp. left foot 8" below knee.

Employment objective, Auto mechanic.

Place of training, Wright's Garage.

Counselor, Mr. Wright or Mr. Barney, Foreman.

The undersigned has this date visited above-named man.

1. Is training satisfactory? Yes.

2. What adjustment has been made? Mr. Barney will speed up Berry at my request as I informed him that trainee was about to be rehabilitated.

3. On what work was man engaged on last visit? Repairing Overland.

4. What was he doing on this visit? Assembling Ford car.

5. Opinion of Counselor on progress. Good.

6. Training hours per day, 9 hrs.

7. Has training been interrupted? Yes. Why? Man has had considerable trouble with leg. Was in Boston two days this week passed and will have to go again latter part of this week to get new foot fitted. Told trainee that we were considering rehabilitating him and to get all the training he could under practical working conditions the same as man under pay from firm. Mr. Barney, the foreman, will now speed trainee up to working standards of firm.

9. Time lost. None, from 2/6/22 to 3/14/22.

10. Did you interview man in person on this visit? Yes.

11. What should be date of next visit to man? 4/21/22.

(Signed) JAMES B. CUMMINGS.

SUPERVISION RECORD

Date, 4/3/22. D No. 834.

Name of trainee, Berry, Leroy Hylmer.

Present address, 36 Clarks Ave., St. Johnsbury, Vt.

Disability, High Expl. shell, amp. left foot 8" below knee.

Defendant's Exhibits.

Employment objective, Auto mechanic.

Place of training, Wright's Garage.

Counselor, Mr. Wright.

The undersigned has this date visited above-named man.

1. Is training satisfactory? Yes.

3. On what work was man engaged on last visit? Assembling new cars.

4. What was he doing on this visit? Rep. Oakland car.

5. Opinion of Counselor on progress. Good.

6. Training hours per day, 9.

7. Has training been interrupted? No.

9. Time lost, 1 day from 3/14/22 to 4/3/22.

10. Did you interview man in person on this visit? Yes.

11. What should be date of next visit to man? 5/3/22.

(Signed) KELLEY.

SUPERVISION RECORD

Date, 5/19/22. C 114 614.

Name of trainee, Berry, Leroy Aylmer.

Present address, 8 Charles Street, St. Johnsbury, Vt.

Employment objective, Auto mechanic.

Place of training, Corner Garage Inc., St. Johnsbury, Vt.

Counselor, Mr. Barney.

The undersigned has this date visited above-named man.

1. Is training satisfactory? Yes.

2. What adjustment has been made? Man was notified by Boston office over 2 months his tools would arrive shortly, but has not received any yet. Please investigate.

3. On what work was man engaged on last visit? Rep. Overland car.

4. What was he doing on this visit? Overhauling rear end.

5. Opinion of Counselor on progress. Good.

Defendant's Exhibits.

6. Payments to man by firm, if any, \$2.50 per day. Training hours per day, 9 hrs.
7. Has training been interrupted? No.
9. Time lost, 3 days. From 4/3/22 to 5/19/22.
10. Did you interview man in person on this visit? Yes.
11. What should be date of next visit to man? 6/30/22.

(Signed) J. T. KELLEY,
Officer Supervising Training.

SUPERVISION RECORD

Date, July 12, 1922. D No. 834.

Name of trainee, Berry, Leroy Hymer.

Present address, 38 Clarks Ave., St. Johnsbury, Vt.

Disability, Amp. left foot below knee.

Employment objective, Auto mechanic.

Place of training, Corner Garage, St. Johnsbury, Vt.

Counselor, Mr. Wright—Mr. Barney.

The undersigned has this date visited above-named man.

1. Is training satisfactory? Yes.
2. What adjustment has been made? This man was at home on account of arm being injured when cranking a car. It happened last week but I was unable to get exact date.
3. On what work was man engaged on last visit? Repairing rear end of car.
5. Opinion of Counselor on progress. Good.
8. If absent on date of present visit, give last date of attendance, 5/19/22.
9. Time lost, See above.
10. Did you interview man in person on this visit? No.
11. What should be date of next visit to man? Aug. 16, 1922.

(Signed) BYRON A. ROBINSON.

Defendant's Exhibits.

REPORT OF SURVEY COMMITTEE.

Date, Aug. 1, 1922.

Trainee's name, Berry, Leroy Almer. Age, 27. C. No. 114-614.

Present address, 38 Clark Ave., St. Johnsbury, Vt.

Disability, Amputation left leg 8 in. below knee, due to H. E.

Education, 9th grade—15 months Illinois Photo College.

Vocational Experience, Photographer 3 yrs. Farmer 1 year.

Present Employment Objective, 1. Photographer. 2. Auto mechanic.

Complete training history: On 9/10/19 entered training at New York Institute of Photography, New York City. Transferred to Illinois College of Photography on Sept. 22, 1919 and completed course on Nov. 18, 1919. In Jan. 1920 was offered a position with the Marceau Studio, Boston, Mass. Man refused position, however he went to work for Carey Maple Syrup Co., \$21 per week doing box making and mechanical work. On Feb. 4, 1920 started work at Marceau studio, Boston, where he left after working $\frac{1}{2}$ day. On 11/15/20 re-entered training as auto mechanic at Thoerson's garage, St. Johnsbury, Vt. Left on Dec. 3, 1920 of own accord. On Feb. 2, 1921 entered Drown's Garage, Lyndonville, Vt. While here he received \$10 a week. On April 19, 1921 left this concern on account of family troubles and entered Morrill's Garage, Danville, Vt., where he received \$2.50 per day. Attitude poor. Maintenance, \$145.

Training officer's recommendation: Recommend man be rehabilitated Sept. 15, 1922.

J. T. KELLEY,

Training Officer.

Recommendation of committee: Recommend continuance in present training until Sept. 15, 1922 at which time training is to

Defendant's Exhibits.

terminate in accordance with Manual of Procedure, Misc. 150
Nov. 21, 1921, Paragraph 32, Sub-division B.

Approved:

A. E. BRIDES, M.D.

District Manager.

FRANCIS CANNON,

J. A. MELEDY, M.D.

J. W. RYAN.

SUPERVISION RECORD.

Date, 8/28/22. D No. 834.

Name of trainee, Berry, Leroy Hylmer.

Present address, 36 Clarks Ave., St. Johnsbury, Vt.

Disability, Amp. left foot below knee.

Employment objective, Auto mechanic.

Place of training, Corner Garage, St. Johnsbury, Vt.

Counselor, Mr. Wright-Mr. Barney.

The undersigned has this date visited above-named man.

1. Is training satisfactory? Yes.
2. What adjustment has been made? Man has received shipping list of tools but has not received the tools yet. These tools were ordered about a year ago.
3. On what work was man engaged on last visit? Out with a bad arm.
4. What was he doing on this visit? Putting in new gasket to a Ford crank case.
5. Opinion of Counselor on progress. Good.
6. Payments to man by firm, if any, \$2.50 per day. Training hours per day, 9.
7. Has training been interrupted? Yes. Why? Accident to arm.
9. Time lost, 5 days, from 7/12/22 to 8/28/22.

Defendant's Exhibits.

10. Did you interview man in person on this visit? Yes.
11. What should be date of next visit to man? 10/4/22.

(Signed) BYRON A. ROBINSON.

SUPERVISION REPORT

D-834.

Date of supervision, 11/3/22.

Name of trainee, Berry, Leroy Hylmer.

Present home address. 38 Clarks Ave., St. Johnsbury, Vt.

Disability, Amp. left foot below knee.

Employment objective, Auto mechanic.

Place of training, St. Johnsbury Garage, St. Johnsbury, Vt.

1. Does disability interfere with progress of training? No.

2. Does training provided meet employment requirements?

Yes.

5. Give full report of accomplishments since last supervision? Man changed place of training Nov. 1st from Corner Garage to the St. Johnsbury Garage. Was out sick today.

6. Why do you consider progress satisfactory or unsatisfactory? Satisfactory from previous reports of Counselor.

7. Name of Counselor consulted and his opinion regarding progress, Counselor out.

8. Time lost, See above.

9. Did you interview man in person on this supervision?

No.

10. What should be the date of next supervision? 12/10/22.

11. Training hours per day, 9.

(Signed) BYRON A. ROBINSON,

Rehabilitation Ass't Supervising Training.

Defendant's Exhibits.

SUPERVISION REPORT

Date of supervision, 12/9/22.

Name of trainee, Berry, Leroy Hylmer.

Present home address, 38 Clarks Ave., St. Johnsbury, Vt.

Disability, Amp. left foot below knee.

Employment objective, Auto mechanic.

Place of training, St. Johnsbury Garage, St. Johnsbury, Vt.

1. Does disability interfere with progress of training? No.

2. Does training provided meet employment requirements?

Yes.

3. Is development of manipulative ability satisfactory?

Yes.

4. Is trainee acquiring satisfactory technical knowledge?

Yes.

5. Give full report of accomplishments since last supervision? Overhauling Nash, Ford and other makes of trucks.

6. Why do you consider progress satisfactory or unsatisfactory? Satisfactory from report of Counselor and from man's attitude towards his work.

7. Name of Counselor consulted and his opinion regarding progress. Mr. Woodbury, Good.

8. Time lost, 1½ days. 11/3/22-12/9/22. Why? On business by permission of Counselor.

9. Did you interview man in person on this supervision?

Yes.

10. What should be the date of next supervision? 1/16/23.

11. Training hours per day, 8.

(Signed) BYRON A. ROBINSON,

Rehabilitation Ass't Supervising Training.

Defendant's Exhibits.

SUPERVISION REPORT

Date of supervision, 1/17/23.

Name of trainee, Berry, Leroy Hylmer.

Present home address, 38 Clarks Ave., St. Johnsbury, Vt.

Disability, Amp. left foot below knee.

Employment objective, Auto mechanic.

Place of training, St. Johnsbury Garage, St. Johnsbury, Vt.

1. Does disability interfere with progress of training? No.

2. Does training provided meet employment requirements?

Yes.

3. Is development of manipulative ability satisfactory?

Yes.

4. Is trainee acquiring satisfactory technical knowledge?

Yes.

5. Give full report of accomplishments since last supervision. Work on motors, rear ends and bearings.

6. Why do you consider progress satisfactory or unsatisfactory? Satisfactory from report of Counselor and from man's attitude towards his work.

7. Name of Counselor consulted and his opinion regarding progress. Mr. Woodbury, Good.

8. Time lost. None, 12/9/22-1/17/23.

9. Did you interview man in person on this supervision?

Yes.

10. What should be the date of next supervision? 2/24/23.

11. Training hours per day, 8.

(Signed) BYRON A. ROBINSON,

Rehabilitation Ass't Supervising Training.

Defendant's Exhibits.

SUPERVISION REPORT

C-No. 114 614.

Date of supervision, 2/17/23.

Name of trainee, Berry, Leroy Aylmer.

Present home address, St. Johnsbury, Vt:

Disability, High ex. shell amp. left foot 8" below knee.

Employment objective, Auto mechanic. Course, Placement.

Place of training, St. Johnsbury Garage, St. Johnsbury, Vt.

Approximate date of termination of training, 4/15/23.

1. Is individual training program being followed? Yes.
2. What was trainee engaged in doing? Overhauling Hudson car.
3. Is training overcoming the handicap of trainee's disability? Yes.
4. Does training provided meet employment requirements? Yes.
5. Is development of manipulative ability satisfactory? Yes.
6. Is trainee acquiring satisfactory technical knowledge? Yes.
7. Give full report of accomplishments since last supervision. General overhauling on Hudson cars. Man has heard nothing in regard to tools ordered. Please expedite.
8. Why do you consider progress satisfactory or unsatisfactory? Satisfactory from report of counselor and from observation of man at work.
9. Name of counselor consulted and his opinion regarding progress. Mr. Woodbury, Good.
10. Time lost, 10 days. 1/17/23-2/17/23. Why? Sick with grip.
11. What should be date of next supervision? 3/24/23.

Defendant's Exhibits.

12. Training hours per day, 8.

(Signed) BYRON H. ROBINSON,

Rehabilitation Assistant Supervising Training.

SUPERVISION REPORT

C-No. 114 614.

Date of supervision, 3/19/23.

Name of trainee, Berry, Leroy Aylmer.

Present home address, St. Johnsbury, Vt.

Disability, High ex. shell amp. left foot 8" below knee.

Employment objective, Auto mechanic. Course, Placement.

Place of training, St. Johnsbury Garage, St. Johnsbury, Vt.

1. Is individual training program being followed? Yes.

2. What was trainee engaged in doing? On repairs to Cadillac truck.

3. Is training overcoming the handicap of trainee's disability? Yes.

4. Does training provided meet employment requirements? Yes.

5. Is development of manipulative ability satisfactory? Yes.

6. Is trainee acquiring satisfactory technical knowledge? Yes.

7. Give full report of accomplishments since last supervision. General overhauling motors, etc., to Oldsmobiles, Cadillacs, etc. Tools received about a week ago.

8. Why do you consider progress satisfactory or unsatisfactory? Satisfactory from report of counselor and from observation of man at work.

9. Name of counselor consulted and his opinion regarding progress. Mr. Woodbury, Good.

10. Time lost. None, 2/17/23-3/19/23.

11. What should be date of next supervision? 4/26/23.

Defendant's Exhibits.

12. Training hours per day, 8.

(Signed) BYRON H. ROBINSON,

Rehabilitation Assistant Supervising Training.

SUPERVISION REPORT

C-No. 114-614.

Date of supervision, Apr. 2, 1923.

Name of trainee, Berry, Leroy A.

Present home address, 38 Clarks Ave., St. Johnsbury, Vt.

Disability, Amp. left leg 8" below knee.

Employment objective, Auto mechanic. Course, Same.

Place of training, St. Johnsbury Garage, St. Johnsbury, Vt.

Approximate date of termination of training, Apr. 15, 1923.

7. Give full report of accomplishments since last supervision. Man to be rehabilitated Apr. 15, 1923 and complete examination is necessary and report submitted to Boston on blue sheet.

J. T. KELLEY.

SUPERVISION REPORT

C-No. 114 614.

Date of supervision, 5/17/23.

Name of trainee, Berry, Leroy Aylmer.

Present home address, St. Johnsbury, Vt.

Disability, High explosive shell, amp. left foot 8" below knee.

Employment objective, Auto mechanic. Course, Placement.

Place of training, St. Johnsbury Garage, St. Johnsbury, Vt.

7. Give full report of accomplishments since last supervision. Man was rehabilitated Apr. 15, 1923. At present is working at above named garage. Is drawing a salary of \$25.00 per week.

Defendant's Exhibits.

Mr. Woodbury, a member of the above firm, says that Mr. Berry is doing very well.

11. What should be date of next supervision? 6/24/23.

12. Payments to man by firm, if any, \$25.00 per week.
Training hours per day, 10.

(Signed) BYRON A. ROBINSON,

Rehabilitation Assistant Supervising Training.

SUPERVISION REPORT

C-No. 114 614.

Date of supervision, 6/19/23.

Name of trainee, Berry, Leroy Aylmer.

Present home address, 4 St. John St., St. Johnsbury, Vt.

Disability, High explosive shell, amp. left foot 8" below knee.

Employment objective, Auto mechanic.

Place of training, St. Johnsbury Garage, St. Johnsbury, Vt.

7. Give full report of accomplishments since last supervision. Man rehabilitated. Is working for above firm at \$25.00 per week. Has not received any compensation check yet. Please expedite. Please take up with nurse the matter of repairs to his wooden leg.

11. What should be date of next supervision? 7/26/23.

(Signed) BYRON A. ROBINSON,

Rehabilitation Assistant Supervising Training.

SUPERVISION REPORT

C-No. 114 614.

Date of supervision, 7/25/23.

Name of trainee, Berry, Leroy Aylmer.

Present home address, St. Johnsbury, Vt.

Disability, High explosive shell, amp. left foot 8" below knee.

Defendant's Exhibits.

7. Give full report of accomplishments since last supervision. Man rehabilitated as auto mechanic. Working for the St. Johnsbury Garage where he finished his training. Is doing good work and is well liked.

11. What should be date of next supervision? 9/1/23.

(Signed) BYRON A. ROBINSON,

Rehabilitation Assistant Supervising Training.

SUPERVISION REPORT

C-No. 114 614.

Date of supervision, 9/12/23.

Name of trainee, Berry, Leroy Aylmer.

Present home address, 4 St. John St., St. Johnsbury, Vt.

Disability, High explosive shell, amp. left foot 8" below knee.

Employment objective, Auto mechanic.

7. Give full report of accomplishments since last supervision. Rehabilitated 4/15/23. Working for the St. Johnsbury Garage, St. Johnsbury, Vt. Doing well. Receiving \$25.00 per week salary.

11. What should be date of next supervision? 10/19/23.

(Signed) BYRON A. ROBINSON,

Rehabilitation Assistant Supervising Training.

IN THE DISTRICT COURT OF THE UNITED STATES

WITHIN AND FOR THE DISTRICT OF VERMONT

LEROY A. BERRY,

vs.

UNITED STATES OF AMERICA.

Civil No. 1183.

MOTION FOR DIRECTED VERDICT

Now comes the defendant, the United States of America and moves this Honorable Court that it direct a verdict for the defendant for the reason that there has been no substantial evidence adduced at the trial of this case upon which the jury could properly find that the insured became permanently and totally disabled while the insurance sued upon was in force.

THE UNITED STATES OF AMERICA,

By TIMOTHY A. CURTIN,

Attorney Department of Justice.

Filed May 17, 1939,

AUSTIN H. KERIN,

Clerk.

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF VERMONT

LERCY A. BERRY,

vs.

UNITED STATES OF AMERICA.

At Law No. 1183.

VERDICT FOR PLAINTIFF

In this cause the jury on their oath say that the defendant is liable in manner and form as the plaintiff in his declaration has alleged and find for the plaintiff to recover from the defendant \$57.50 a month from June 16, 1918, to May 31, 1939, inclusive, being 252 months, amounting for \$14,490.00.

H. C. WORMWOOD,

Foreman.

Filed May 17, 1939,

AUSTIN H. KERIN,

Clerk.

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF VERMONT

LERROY A. BERRY,

vs.

UNITED STATES OF AMERICA.

At Law No. 1183.

JUDGMENT ORDER

ORDERED that judgment be and it hereby is entered on the verdict in this case for the plaintiff to recover from the defendant \$57.50 a month from June 16, 1918, to May 31, 1939, inclusive, being 252 months and amounting to the sum of \$14,490.00; and it is

FURTHER ORDERED that Ernest W. Gibson, Jr., Esq., attorney for the plaintiff be paid as a reasonable attorney fee for his services herein and on appeal and until final judgment, the sum of ten percent of the amount of the judgment recovered herein, amounting to \$1,449.00, and also ten percent of all future payments of insurance paid on the insurance policy as a result of the verdict and judgment herein.

Done in Court at Montpelier, in the District of Vermont, this 17th day of May, 1939.

HARLAND B. HOWE,

United States District Judge.

Filed May 17, 1939,

AUSTIN H. KERIN,

Clerk.

DISTRICT COURT OF THE UNITED STATES

DISTRICT OF VERMONT

LEROI A. BERRY,

vs.

UNITED STATES OF AMERICA.

No. 1183 Law.

NOTICE OF APPEAL

Notice is hereby given that the United States of America defendant above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the final judgment entered in this action on May 17, 1939.

JOSEPH A. McNAMARA,
United States Attorney,
By WILLIAM J. HESSON,
Attorney, Dept. of Justice,
Federal Building,
Burlington, Vermont.

Dated: August 9, 1939.

Filed August 9, 1939,
AUSTIN H. KERIN,
Clerk.

DISTRICT COURT OF THE UNITED STATES

DISTRICT OF VERMONT

ERROY BERRY,

vs.

UNITED STATES OF AMERICA.

No. 1183 Law.

MOTION

Now comes the Defendant, the United States of America,
and moves this Honorable Court that the time for filing the record
on appeal and docketing the action with the United States Court
of Appeals for the Second Circuit be extended to November 7,
1939.

JOSEPH A. McNAMARA,
United States Attorney,
By WILLIAM J. HESSON,
Attorney, Dept. of Justice.

ORDER

ORDERED that the time for filing the record on appeal
and docketing the action with the United States Circuit Court
of Appeals for the Second Circuit be extended to November 7,
1939.

HARLAND B. HOWE,
Judge, U. S. District Court.

Date: September 14, 1939.

Filed September 14, 1939,
AUSTIN H. KERIN,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

LERROY BERRY,

vs.

UNITED STATES OF AMERICA.

*U. S. District Court for
the District of Vermont
No. 1183 Law.*

**MOTION FOR EXTENSION OF TIME FOR
DOCKETING APPEAL**

Now comes the defendant, the United States of America, and moves this Honorable Court that the time for filing the record on appeal and docketing the action with the United States Circuit Court of Appeals for the Second Circuit be extended to December 15, 1939.

The defendant says in support of its motion as follows:

1. That this suit was instituted on April 6, 1936.
2. That the case was tried before the United States District Court for the District of Vermont and a jury from May 15, 1939 to May 17, 1939 and on May 17, 1939 the jury rendered a verdict in favor of the plaintiff in the sum of \$14,490.00.
3. That judgment for the plaintiff was entered by the Court on May 17, 1939.
4. That Notice of Appeal was filed with the Clerk of the United States District Court for the District of Vermont on August 9, 1939.
5. That the United States District Court on September 14, 1939 extended the time for filing the record on appeal and docketing the action with the United States Circuit Court of Appeals

Motion for Extension of Time.

to November 7, 1939, the maximum time that such an extension could be granted by the District Court.

6. That the delay in perfecting the appeal and docketing the same with the United States Circuit Court of Appeals has been due to the fact that the court stenographer who took the testimony at the trial of this cause has not yet furnished the defendant with copies of the transcript of the testimony.

7. That the delay in this cause has been in no way due to any fault or action on the part of the defendant.

JOSEPH A. McNAMARA,
United States Attorney,
 By WILLIAM J. HESSON,
Attorney, Dept. of Justice.

Further notice is hereby waived.

Attorney for the Plaintiff.

ORDER

ORDERED that the time for filing the record on appeal and docketing the action with the United States Circuit Court of Appeals for the Second Circuit be extended to December 15, 1939.

LEARNED HAND,
*Judge, United States Circuit Court
 of Appeals for the Second Circuit.*

Date: Oct. 23, 1939.

Filed October 25, 1939,
 ARNOLD A. MURRAY,
Deputy Clerk.

DISTRICT COURT OF THE UNITED STATES

DISTRICT OF VERMONT

LEROY A. BERRY,

vs.

UNITED STATES OF AMERICA.

*Law No. 1183.***STIPULATION DESIGNATING THE CONTENTS
OF THE RECORD**

It is hereby stipulated and agreed that the following shall be a designation of the record on appeal in the above captioned case to the Circuit Court of the United States for the Second Circuit:

1. Statement of the case.
2. Plaintiff's petition with affidavit of service.
3. Defendant's answer.
4. Transcript of the testimony.
5. Plaintiff's exhibits, 1 to 1-M, inclusive.
6. Defendant's exhibits, A to H, inclusive.
7. The deposition of J. C. Hestwood.
8. Defendant's motion for a directed verdict and the Court's order denying the same.
9. Special findings of the jury.
10. Verdict of the jury.
11. Judgment for the plaintiff.
12. Notice of appeal and the date of filing of same, i.e., August 9, 1939.

Stipulation.

13. Defendant's motion in the District Court of the United States in the District of Vermont, to extend the time for filing the record on appeal and docketing the action in the United States Court of Appeals for the Second Circuit to November 7, 1939, and the order of said court extending the time for filing the record on appeal and docketing the action in the United States Circuit Court of Appeals for the Second Circuit to November 7, 1939, signed by Harland B. Howe, Judge of said District Court.

14. Defendant's motion in the United States Circuit Court of Appeals for extension of time for the docketing of appeal and the order of Honorable Learned Hand, Judge of said United States Circuit Court of Appeals for the Second Circuit, allowing said motion and extending the time for docketing said appeal to December 15, 1939.

15. Statement of points upon which the appellant relies on its appeal.

Signed at Rutland in the District of Vermont this 7th day of November, A.D., 1939.

ERNEST W. GIBSON, JR.,

Attorney for the Plaintiff.

TIMOTHY A. CURTIN,

Attorney for the Defendant.

Filed November 8, 1939,

A. MYRL BLAKELY,

Deputy Clerk.

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

UNITED STATES OF AMERICA,
Defendant-Appellant,

vs.

LEROY A. BERRY,

*Plaintiff-Appellee.**Law No. 1183.***STATEMENT OF POINTS RELIED UPON
BY THE APPELLANT ON ITS APPEAL**

Now comes the defendant-appellant; the United States of America, by its attorneys, Joseph A. McNamara, United States Attorney and Timothy A. Curtin, Attorney, Department of Justice, and in connection with its appeal sets forth the following points on which it relies to reverse the judgment therein:

1. The Court erred in allowing Dr. John P. Tierney, a witness called by the plaintiff, to express an opinion based upon the following hypothetical question propounded to him by plaintiff's attorney over the objection of the defendant:

"Q. Doctor, you assume that this man was in a dugout in June of 1918 when a shell exploded and killed three or four men in the dugout and practically blew his left leg off, and the man had already received other wounds in other parts of his body; that this happened at four o'clock in the morning and that he was about 10:30 taken to the field hospital and finally taken back to the evacuation hospital around six o'clock in the evening, and was then shortly thereafter operated upon, leaving the leg in the condition as you observed it in 1920, and after observing that over a long period of time what is your opinion as to whether that

Statement of Points.

man because of this experience, would ever be able to work continuously at a gainful occupation?

Mr. Curtin: I object. It is the issue for the jury.

The Court: I don't think so on this nervous disturbance.

Mr. Curtin: Of course, it goes to the weight, too. I also question the Doctor's qualifications to pass on a nervous condition. He hasn't stated any background or educational experience.

The Court: Twenty years practice ———

Mr. Curtin: I know it but this—he said he was a surgeon. That's the only testimony he has given in the line of medical work.

The Court: No, he said he was a Doctor of Medicine—M.D.—I will let him answer that.

Mr. Curtin: Note an exception on the ground I stated.

Q. repeated by reporter. A. I don't believe he ever will be able to work continuously at a gainful occupation.

Q. Do you think he would have been at any time since this wound was received?

Mr. Curtin: I object for the same reason stated before. Exception.

Q. repeated by reporter. A. I couldn't see where this man could be in any condition to resume a gainful occupation since the wound was received."

2. The Court erred in denying the defendant's-appellant's motion to strike the testimony of Dr. Horace G. Ripley, a witness called by the plaintiff, which motion was urged upon the Court as follows:

Statement of Points.

"Mr. Curtin: At this time I move the testimony of Dr. Ripley be stricken for the following grounds. On cross examination the Doctor stated all his opinion was based on history alone. This suit was brought in 1931 and the examination in 1937—six years after the institution of the suit, and the examination was for the purpose of testifying here and I think it is improperly allowed in Court. If the history is not admissible, certainly the examination of the Doctor based on history alone is not.

The Court: Denied.

Mr. Curtin: Exception."

3. The Court erred in allowing Leroy A. Berry, the plaintiff, to testify to certain conversations which he claimed to have had with the doctors at the time of his discharge from the United States Army, as is more fully shown in the following excerpt from the transcript of the testimony:

"Q. At that time also did you have a talk with your discharging doctors about your general physical condition? A. Yes.

Q. Tell us about that.

Mr. Curtin: I object to this.

Mr. Gibson: He has put in his record there.

The Court: You put in what they put down.

Mr. Curtin: I did not. That is Pltfs. Ex. 1. I don't see how the plaintiff can put in evidence like he has put in in the A. G. O. record and now show by oral testimony any change. He has got to rely on his own evidence.

The Court: Allowed.

Mr. Curtin: I object to it on the ground it's hearsay and improper. Exception.

Statement of Points.

Q. repeated by reporter. A. I complained of the trouble in my hip and complained at that time of being nervous and not being able to sleep, and being sick to my stomach from noises, and all those different things. They told me the nervousness was something would wear off; it was so soon after being wounded that it would wear off within a short time, and that the hip, it wasn't necessary to put that it, that it was in the Service Record;— it wasn't necessary to put it in, and I didn't need that on compensation because there was no provision made for it as regards compensation."

4. The Court erred in denying the defendant's motion for a directed verdict at the close of all of the evidence in the case, which motion was urged upon the Court as shown by the following excerpt from the transcript of the testimony:

"Motion for Directed Verdict

Now comes the defendant, the United States of America and moves this Honorable Court that it direct a verdict for the defendant for the reason that there has been no substantial evidence adduced at the trial of this case upon which the jury could properly find that the insured became permanently and totally disabled while the insurance sued upon was in force.

THE UNITED STATES OF AMERICA,
By TIMOTHY A. CURTIN,
Attorney, Department of Justice.

The Court: Motion denied and the defendant has an exception."

Statement of Points.

WHEREFORE, the defendant prays that judgment of the District Court for the District of Vermont may be reversed.

UNITED STATES OF AMERICA,

By JOSEPH A. McNAMARA,

United States Attorney,

TIMOTHY A. CURTIN,

Attorney, Department of Justice.

Filed November 10, 1939,

AUSTIN H. KERIN,

Clerk,

By A. MYRL BLAKELY,

Deputy.

PLAINTIFF'S ASSENT TO THE PRINTED RECORD

It is hereby agreed that the foregoing is a true and complete transcript of the record.

Attorney for Plaintiff (Appellee).

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA

DISTRICT OF VERMONT

I, AUSTIN H. KERIN, Clerk of the District Court of the United States, within and for the District of Vermont, in the Second Circuit, do hereby certify that the foregoing pages numbered from 1 to 380 inclusive, contain a true and correct transcript of the record on appeal as stipulated by the parties in the case entitled:

LEROY A. BERRY

vs.

UNITED STATES OF AMERICA.

IN TESTIMONY WHEREOF, I have caused the seal of said court to be hereunto affixed at the City of Burlington, in said District of Vermont, this _____ day of December, in the year of our Lord One Thousand Nine Hundred and Thirty-Nine and of the Independence of the United States, One Hundred and Sixty-Fourth.

Austin H. Kerin

Clerk.

[fol. 383] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1939

No. 265

(Argued March 21, 1940. Decided April 29, 1940)

LEROY A. BERRY, Appellee,
against

UNITED STATES, Appellant

Appeal From a Judgment of the District Court for the
District of Vermont in an Action to Recover Upon a Policy
of War Risk Insurance

Before L. Hand, Augustus N. Hand and Chase, Circuit
Judges

Keith L. Seegmiller for the appellant.
Ernest W. Gibson, Jr., for the appellee.

[fol. 384] L. HAND, C. J.:

This is an appeal from a judgment entered upon the verdict of a jury in an action upon a policy of war risk insurance. The only substantial question is whether there was evidence on which a jury might find that the plaintiff was permanently and totally disabled on September 1, 1919. He was a farmer, born in Vermont in 1892, and served in the army in France during the Great War. In June of 1918, while standing guard in the front line, a shell burst close to him and wounded him in several places. He was ordered to a dug-out until the shelling stopped, so that he could go back to a "first-aid station"; and while waiting there, another shell exploded in front of the door. This killed several of the men in the dug-out, and nearly severed the plaintiff's left leg. He was finally brought to a hospital where the leg was amputated between five and six inches below the knee, and where his other wounds were dressed. He was shipped back home in August and arrived at Boston in September. He was in two hospitals until about Christmas, at which time a temporary artificial leg was given him, on which he could do some walking. After his discharge on

January 2, 1919, the stump continued to trouble him; apparently the operation had not been well done, and it was never found possible to furnish him with an artificial leg that would prevent boils and abscesses from breaking out after he had stood upon it for three days or more. The Veteran Administration recognized that he was very heavily handicapped in earning capacity, and offered him vocational training. He had had some acquaintance with photography before he went into the army, and they gave him training in that—not at his own choice, as he said, but at theirs. He finished the course in November, 1919, and in January, 1920, was offered a "retouching job" in Boston. This he gave up [fol. 385] after a trial of an hour and a half, giving as the reason that his hand shook too much. A jury might have found that his experiences in the war had unsettled his nervous system so much that he could not do "retouching"; but it does not appear that he could not have been successful in other branches of photography which he never tried. Certain it is that he was neurasthenic, and had uncontrollable accesses of terror at any explosion, or even during thunder-storms.

He did no work for about a year, though he made several efforts; his inability being chiefly due to the condition of his leg, which had to be operated upon once more in the spring of 1920. It had measurably healed by July and he did some intermittent work during the rest of that year. In January of 1921, the authorities gave him a new course in vocational training as an automobile or garage mechanic; this was at his own insistence, and against their advice, since the condition of his leg made it unlikely that he could stand for as long as such work required. The "statistical report" of the Veterans' Bureau, which was not effectively discredited, shows that from February, 1921, to April 15, 1923, he was employed more than twenty-six months in all, losing therefore not much more than one. This completed his training, and he worked on his own for about six months more, say till November, 1923, when he abandoned this calling because of his infirmity. A jury might have found that it required more standing than he was capable of, and that he was therefore unfitted for it.

In the spring of 1924 he got possession of a small dairy farm where with his wife he worked from 1924 to 1928. He did some of the work about the place, but she and a hired

man did the greater part, and they sold on an average about thirteen dollars a month of milk, cream and butter fat. It does not appear that he did not contribute appreciably to the work. In addition during this period he set up a small garage with one, Orcutt, and later, after he had lost his farm, a second garage in the autumn of 1928, with one, [fol. 386] Bishop; both of these had failed by the end of 1929, his explanation for the second being that he could not do enough work himself, or be "around" to keep an eye on the business. From the middle of February, 1930, to the end of that year, he was a salesman of aluminum cooking utensils. During that period of ten and a half months he sold about \$2,200 of these wares at a commission of between thirty and forty per cent; which must have brought him about \$700, or at the rate of nearly \$70 a month. The only reason he gave for abandoning this business was that "we couldn't put on suppers enough to keep going and keep up our expenses and make a living". The plaintiff and his wife would make "demonstrations" of the utensils by cooking meals at the houses of prospective customers and making a later call to sell. The expense was the food, which they furnished, and the cost of the car, and it does not appear how much these amounted to. The plaintiff did not say that they equalled his commissions, but only that a "living" was not left over. Perhaps not, but it does not appear that the job was not "substantially gainful". During the eight years following 1930, he did odd jobs as a salesman of various wares, as a truckman, and at a filling station. He kept an automobile license all the while. In all he gave the condition of his leg as the reason for his inability to keep to them, but it is not apparent why this should have disabled him in all.

No one can fail to sympathize with the sufferings and broken life of this unhappy victim of war; but the issue is not whether he deserves more than the compensation which he has already received; but whether his case falls within the compass of a contract of insurance; that is, whether his injuries prevented his continuous pursuit of "any substantially gainful occupation". To succeed upon that issue he must show; not only that he was unfitted for his former [fol. 387] calling, or for that for which he chose to be trained, but for any other that was open to him. *Lumbra v. United States*, 290 U. S. 551, 559; *Miller v. United States*, 294 U. S. 435, 441; *Byrne v. United States*, 77 F. (2d) 829 (C. C. A. 2).

There was no convincing evidence to justify that conclusion, although a jury might have found that he was unable to do the work of a garage mechanic, or of a "retoucher" of photographs. Not only did he fail to prove that there were no "gainful occupations" open to him, but the evidence affirmatively proved the contrary. As salesman of aluminum utensils he succeeded in earning gross, in the neighborhood of seventeen dollars a week for nearly a year, and it does not appear that his discontinuance of the business was due to his injury. Furthermore, as we have said, it is not clear that his failure to keep employed for the years after 1930 was because of his leg. In several decisions it was held that the loss of a leg does not completely disable a man, and common experience confirms that conclusion. *Hanagan v. United States*, 57 F. (2d) 860 (C. C. A. 3); *United States v. Mayfield*, 64 F. (2d) 214 (C. C. A. 10); *United States v. Harris*, 66 F. (2d) 71 (C. C. A. 4); *United States v. Tarrer*, 77 F. (2d) 423 (C. C. A. 5). Such unfortunates deserve the most generous consideration from those who have happily escaped their plight; but the example of many of them proves that they are not utterly without earning power. In several of the decisions just cited the amputation had left the stump subject to repeated soreness which interfered with the use of an artificial leg.

Finally, while we cannot promptly hold that a delay of thirteen years is conclusive evidence against such a claim, it imposes a heavy burden upon the claimant. *Lumbra v. United States*, supra, 560, 561 (290 U. S. 551); *United States v. Hairston*, 55 F. (2d) 825, 827 (C. C. A. 8); *United States v. Fain*, 103 F. (2d) 161, 164 (C. C. A. 8). The plaintiff did not produce that "clear and satisfactory evidence" to excuse his delay without which it is "strong evidence that he [fol. 388] was not totally and permanently disabled". All he said was that at the time of his discharge he had been told that he could not sue unless he was so bed ridden and helpless that he required an attendant. In 1928 he signed an application for life insurance in which he gave his occupation as "auto mechanic", and declared that he had "lost from work through illness during the last five years" only a few weeks due to an operation for appendicitis. Plainly he did not then regard himself as wholly incapacitated.

Judgment reversed; petition dismissed.

[fol. 389] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of May one thousand nine hundred and forty.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

LEROY A. BERRY, Plaintiff-Appellee,

v.

UNITED STATES, Defendant-Appellant

Appeal From the District Court of the United States for the
District of Vermont

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Vermont, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and cause remanded with instructions to dismiss the petition.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 390] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Leroy A. Berry v. United States. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 15, 1940. D. E. Roberts, Clerk.

[fol. 391] UNITED STATES OF AMERICA,
Southern District of New York:

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 390, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Leroy A.

Berry, Plaintiff-Appellee, against United States of America, Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of July, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fifth.

D. E. Roberts, Clerk. (Seal.)

[fol. 392] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1940.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Office - Supreme Court, U. S.

FILED

AUG 14 1940

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 336

LEROY A. BERRY,
PETITIONER,

v.
UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

C. L. DAWSON,
Washington, D. C.

P. F. GIBSON,

F. E. BARBER, JR.,
Brattleboro, Vt.,

Attorneys for the Petitioner.

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INDEX.

	PAGE.
Opinions.....	1
Jurisdiction.....	2
Questions Presented.....	2
Statement of Facts.....	2
Specification of Errors to be Urged.....	3
Reasons for granting Writ.....	3
Treasury Decision 20.....	4-5
Conclusion.....	19-20

AUTHORITIES.

Baltimore & C Line, Inc. v. Redman, 295 U. S. 654, 79 L. Ed. 1636.....	18-19
Gunning v. Cooley, 281 U. S. 90-94.....	15
Hearst Radio, Inc. v. Good, 67 App. D. C. 250, 251, 91 Fed. (2d) 555, 556.....	15
Lumbra v. U. S. 290 U. S. 511, 78 L. Ed. 492.....	5-15
Slocum v. New York Life Ins. Co. 228 U. S. 364, 57 L. Ed. 879.....	18
Thomas v. U. S., 92 Fed. (2d) 929.....	15
U. S. v. Suomy, 70 F. (2d) 542.....	16
U. S. v. Dupire, 101 F. (2d) 945.....	15
U. S. v. Gamble-Shagno, Inc., 91 F. (2d), 372, 374, 8th CCA.....	15
U. S. v. Scarborough, 57 F. (2d) 137.....	16
U. S. v. Rice, 72 F. (2d) 676.....	15
U. S. v. Stewart, 61 App. D. C. 115, 58 Fed. (2d) 520.....	15
U. S. v. Ingalls, decided by the U. S. Ct. of App. D. C. on August 5, 1940.....	15
U. S. v. Rasar, 45 F. (2d) 545.....	16

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1940.

No.

LEROY A. BERRY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.**

*To the Honorable, Chief Justice, and the Associate Justices
of the Supreme Court of the United States:*

The petitioner, and the appellee below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on May 15, 1940 (R. 387).

OPINIONS BELOW.

The Judge of the District Court of the United States for the District of Vermont did not render an opinion. The opinion of the United States Circuit Court of Appeals for the Second Circuit is set forth in the record at pages 383-386.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on May 15, 1940 (R. 387).

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

This case involves two questions. First, whether the petitioner adduced sufficient evidence at the trial of his cause to sustain the verdict of the jury finding him permanently and totally disabled under his war risk insurance contract as of June 16, 1918 (R. 36). Second, whether the United States Circuit Court of Appeals for the Second Circuit erred in directing the District Court to dismiss the petition of the petitioner instead of ordering a new trial.

STATUTES AND REGULATIONS INVOLVED.

The pertinent statutes and regulations relating to permanent and total disability under the War Risk Insurance Contract of the petitioner will be hereinafter discussed.

STATEMENT OF FACTS.

The petitioner brought suit on his \$10,000 war risk insurance contract (R. 3) in the United States District Court for the District of Vermont. He alleged that while in the military service of the United States during the World War, he applied for and was granted \$10,000.00 War Risk Insurance, and that while this contract was in force he became permanently and totally disabled, in June, 1918, and entitled to payments in accordance with its terms (R. 4).

At the trial of this cause the petitioner adduced evidence showing that he had suffered the loss of his left leg while engaged on the battlefields of France, and that he had also sustained a severe nervous shock and injury to his right leg;

that he had been unable to use his artificial limb for his left leg, and furthermore that he had had no substantial earning capacity since the date of his injury in France. The jury rendered a verdict in petitioner's favor, finding him permanently and totally disabled as of June 16, 1918 (R. 368).

The respondent appealed upon the ground that the District Court erred in refusing to direct a verdict for the respondent on the ground that the evidence was insufficient to show that the petitioner became permanently and totally disabled on June 16, 1918, as found by the jury.

The United States Circuit Court of Appeals for the Second Circuit reversed the judgment of the District Court for the reason that it was held that the Trial Court should have granted the motion of the respondent for a directed verdict. The first question involved in this case is whether there was enough evidence offered on behalf of the petitioner to justify the submission to the jury of the question of permanent and total disability. The petitioner insists that there was ample evidence upon which a jury of reasonable men could have reasonably found that the petitioner was permanently and totally disabled on the date alleged, and that the issue as to permanent and total disability was one of fact and not of law, and that the verdict of the jury should not have been set aside.

SPECIFICATION OF ERRORS TO BE URGED.

That the United States Circuit Court of Appeals for the Second Circuit erred in holding that the District Court should have directed a verdict for the respondent because of insufficiency of the evidence to sustain the petitioner's cause of action, and that the Circuit Court further erred in dismissing the petitioner's cause of action and not awarding a new trial.

REASONS FOR GRANTING THE WRIT.

The petitioner asserts that a writ of certiorari should be granted under subdivision 5 (b) of Rule 38 of this Court in that the United States Circuit Court of Appeals for the Second

Circuit has rendered a decision in conflict of the decision of the other Circuit Courts of Appeal on the same question, and has decided a question of law in conflict with the decisions of this Honorable Court, and has deprived the petitioner of the right of a trial by jury on an issue of fact in violation of the Seventh Amendment to the Constitution of the United States of America.

ARGUMENT AND BRIEF.

POINT 1.

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, which ordered the reversal of a judgment in favor of the petitioner on a war risk insurance contract in the District Court of the United States for the District of Vermont, and directed the dismissal of the petitioner's cause of action.

The Circuit Court held in its opinion that the petitioner did not adduce sufficient evidence to show that he became permanently and totally disabled on June 16, 1918; the date found by the jury. The Circuit Court therefore concluded that the District Court erred in refusing to direct a verdict for the respondent.

Permanent and total disability has been defined under the contract of war risk insurance as follows:

"Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Article III and IV, to be total disability.

" 'Total disability' shall be deemed to be 'permanent' whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled has recovered the ability to continuously follow any substantially gainful occupation the payment

of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue."

(Reg. 11—March 9, 1918.)

This regulation defining permanent and total disability has been interpreted by this Court in the case of *Lumbra v. United States*, 290 U. S. 511, 78 L. Ed. 492. This Court held that in order to meet the requirements of permanent and total disability one must not be hopelessly bedridden, nor would the mere fact that the disabled veteran had engaged in an occupation or occupations at various periods prevented a recovery on the war risk contract.

In other words where the degree of disability is major and the veteran has been unable to work continuously without injury to his health and danger to his life, the mere fact that he has performed some labor, will not prevent recovery on his war risk insurance contract.

In order to ascertain the correctness of the ruling of the Circuit Court it becomes necessary to examine the evidence offered on behalf of the petitioner. The rule is well settled that if there is any evidence from which reasonable men could reasonably find for the petitioner the issue of fact is for the jury. It is only when the evidence is wholly insufficient that the Court is justified in directing a verdict for the respondent. *Gunning v. Cooley*, 281 U. S. 90-94. Therefore with this rule in mind let us examine the evidence offered to the trial of this cause.

The petitioner enlisted in the military service July 1, 1917 (R. 283). His pre-war occupation was that of a farmer. He went over seas in September, 1917 (R. 12). In February, 1918, he went into the front lines at Chemin Des Dames, and during this period of time had the mumps (R. 13). In April, 1918, he was transferred to the Tour sector and was under heavy shell fire. The last of May and 1st of June, 1918, he suffered from influenza and was hospitalized, and was released from the hospital June 8, 1918 (R. 294-5). Eight days after being discharged from the hospital following his influenza attack he

was placed in front line trenches on an all-night guard watching for raids and enemy patrols. It was then when the incident happened which petitioner claims resulted in his permanent and total disability. Following is his description:

"I was standing guard and the enemies started shelling the front line, and the first shell * * * * came over near where I was * * * landed very close to our squad and that was where I got my first wounds. * * * One piece [of shrapnel] went in my right arm just above the elbow and another piece in the right shoulder, and one piece in my right hip, and a couple small pieces in front of my right ear * * * there is still a piece in my elbow and still a piece in front of my ear. The other two pieces have worked out. * * * The first thing I knew after I was hit there was a fellow helped me down the trench toward a dugout; another fellow was helping me down the trench and we met Platoon Lieutenant * * * I was ordered to go down into this dugout. The other man was ordered to take me down there until the barrage lifted, or they stopped shelling the front lines, so I could get back to the First Aid Station. * * * [There] I found several other fellows in a similar condition. They had all been hit and were waiting for an opportunity to get back to the First Aid Station. * * * There was, well, eight or nine or ten, I don't remember exactly how many, and a couple of fellows in there—one was our Platoon Sergeant. [He] was trying to undo a first aid pack to put on another fellow's leg and there was another fellow that was wounded—not very severely—that tried to undo one to put on my hip. The barrage started about 3.30 in the morning and it was probably within fifteen minutes that I went into this dugout * * * I had been in the dugout about fifteen minutes to half an hour when another shell came over and struck directly in front of the dugout door. The dugout, by the way, was only a small thing; it wasn't any depth or size to it—just a sort of shelter in the side of the trench. This shell struck probably fifteen feet in front of our door * * * and it upset the whole nine of us or ten of us whatever it was that was in there, and I know the Sergeant that was right beside my feet, trying to undo the first aid pack. It killed him outright and he landed over on top of me—pitched over right on top of me—when I got him off my body I

found my leg here was hit; I found the bottom of the foot was turned up so I could see the bottom of the shoe; it was practically cut off. * * * It was the left leg below the knee and the blood was streaming out. There was no one—didn't seem to be—there to help me to cord it up or anything of that sort and I managed to take what was left of my wrap legging that we all wore and tied it around there and twisted it up enough so it shut the blood down some. Within a few minutes there was another fellow came along and looked in there— He put a stick through the tourniquet I had on there and twisted it up and fastened it so it would stay. [In the dugout] there was two others that died within a very few minutes that were right there very near to me, and there was two beside myself that I know of got out of it alive that are still living * * * [After this shell hit] there was no one able to move to get out of there or anything of that sort. It was approximately 10.30 in the forenoon before I was put on a stretcher and carried out. * * * I was taken back to the First Aid Station where they put on what was called a Thomas splint to hold that foot out straight and stretch it out so the bones wouldn't grate together, and a different tourniquet put on and something for a dressing was put on and they gave me, I think, at that place, two shots in the arm. * * * It was about five or five-thirty in the afternoon when I got back to the hospital where there were doctors. I was carried into the receiving ward along with others and laid on the floor in a line * * * and the operating surgeon came out * * * and looked along at the different fellows there in the receiving ward; he started to pass me and looking along at the different ones turned around and came back to look at me and spoke to me and asked me where I was hit. I told him my leg and he lifted up the blanket and looked at it, felt of my pulse, and turned around to the attendant and told him to get my clothes off and get me into the operating room as quick as they could." (R. 14-15-16 and 17.)

The left leg was amputated about five and one-half inches below the knee. In addition thereto the petitioner sustained an injury on his right leg on the inside near the crotch. As a result of this injury he has a scar $7\frac{3}{4}$ inches long on the back

of the leg where part of the shrapnel came out and the rest was removed after the left leg was amputated. He also sustained a further injury on the right leg, leaving a scar of about 3 inches below the hip bone in the rear of the right leg. He also sustained an injury of the right arm just above the elbow on the right side. There was another injury just in back of the right shoulder just below the shoulder joint. There was also an injury on the right chest just under the collarbone on the right side, and an injury just in front of the right ear, all as a result of the shell explosion. At the time of his discharge, the petitioner complained to the discharging Doctors of the trouble in his right hip and of being nervous and not able to sleep and being sick to his stomach from noises and different things. The petitioner was advised that his nervousness would wear off and at the time of his discharge from the service the amputated leg had healed except for a little spot, which discharged periodically (R. 130). He had a temporary wooden leg which he could not use because it did not fit. He used crutches and a cane to get along without the temporary leg (R. 20). In May, 1919, the petitioner was furnished another leg which caused blisters and abscesses and the stump would become very sore if used for any length of time (R. 20). He was married on April 19, 1919, and went to Boston on his wedding trip (R. 187). At the time of his marriage he couldn't use his artificial leg for two days at a time (R. 25). This condition has existed since his military service and certainly since his marriage (R. 191). In the summer of 1919 the petitioner was sent to a photography school in New York. This was vocational training given him by the Government. The stump of his leg bothered him all this summer, getting blistered and sore, and he started having trouble on the outer side of the leg (R. 25). He used crutches a great deal, which made it difficult to get on and off cars, and resulted in falls (R. 25, 26). In the summer of 1919 thunder showers made him ill if he was awake. They nauseated him and made him sweat. When the showers came at night the petitioner would live the war over again. "See the whole thing all over again." "See the shells flying

and breaking." (R. 27.) The evidence further shows that since his discharge the petitioner has been to two Fourth of July celebrations where there were fireworks. On both of these occasions he became sick and shook all over. If the petitioner goes to the movies and sees soldiers, airplanes or shooting, it makes him sick and nervous and he leaves because he can't stand it (R. 27). Thunder storms have had a bad effect on him; they upset his stomach and this has been true since his discharge (R. 189).

In the year of 1919, a nerve abscess came on the stump. The petitioner was treated by the Veterans Bureau in New York and by Dr. Bookstaver in whose apartment they were living. The petitioner was in New York four months that time and then went to Effingham, Illinois, where he was on crutches some of the time. He returned to New York in November, 1919, and found he was not able to do retouching of photographs because he was so nervous and his hand shook (R. 30).

At the request of the Government the petitioner did go to Boston to try retouching photographs at Marceau's studio, and found he couldn't do it (R. 133, 134), after working one and one-half hours. During the remainder of the year of 1919 and the winter of 1920, the petitioner did no work. In the spring of 1920, he moved to St. Johnsbury, Vermont, and went to work for the Fairbanks Scale Shop in the paint department, where he worked eight days, and lost his job because he was losing so much time. Then he went to work at the Carey Box Shop which was near where he was living. He lost a lot of time because of nerve abscesses on his stump, and at this time Dr. Tierney of St. Johnsbury treated his leg for nerve abscess and blister, and recommended that the petitioner go to the Parker Hill Hospital for an operation (R. 30). The petitioner did go to the Parker Hill Hospital in the spring of 1920 and was there for two weeks; he was operated on and two growths were taken out. He returned home during the Middle of May, 1920 and was not able to work any more that summer or fall. The stump didn't heal up until late July, and, thereafter, the stump was so tender the artificial leg was unbearable (R. 31).

It can thus be seen that for the first two years following his discharge from the service the petitioner did not work at any gainful occupation because of his wounds and nervous condition. In January, 1921, the Government started the petitioner in vocational training as an auto mechanic (R. 32). He was with the Lyndonville Auto Sales Company until May of 1921, and then tried the Morrow Garage in Danville, where he was for about three months. Thence he went to the Corner Garage in St. Johnsbury and trained there until November, 1922 (R. 32). While at the Morrow Garage he was treated by Dr. Libby (R. 127). While training at the Corner Garage he would take his artificial leg off and put it on the bench while he worked, and used crutches. There he used to be given work taking up bearings where he could lie on his back (R. 102). The foreman had trouble keeping him because the owner wanted the petitioner to be discharged because he had lost so much time (R. 102).

The respondent's Exhibit H (R. 344) shows that the petitioner lost considerable time on account of sickness while in vocational training. The Veterans Bureau officials wrote him letters, inquiring why he had lost so much time, and the vocational officer complained to him about his lost time (R. 34). The petitioner left the Corner Garage in November, 1922, and went to Woodbury and Benoit's Garage in St. Johnsbury, where he completed his training in April, 1923. After he completed his training he worked nearly six months, but missed at least two days a week. He was troubled with his stomach, stump and right hip during this time. He was discharged because he didn't attend to his work steady enough (R. 35 and R. 216).

After he was discharged from Woodbury and Benoit's Garage in the fall of 1923, he tried working again at the Fairbanks Scale Shop doing work on electric motors and machines. He worked there about two weeks and was discharged because he lost so much time due to his leg (R. 36). He did no other work until March, 1924, until he was able to do repair work at his home (R. 37). From the spring of 1924, until the year of 1928, he lived on a farm near Sheffield. While on this farm he was

treated by Dr. Herrick of West Burke, and Dr. Jones of Sheffield (R. 127). During this four year period the petitioner did very little farming on the farm because of his leg; the farm was run by his hired man and his wife. His wife's two sisters lived with them about half of the time and they helped with the chores and the garden. The petitioner couldn't garden because of his leg; he couldn't get around the garden on crutches. In 1925, he went into a little garage business in Sheffield for a few months with a man named Orcutt, but Orcutt didn't stay in the partnership because he had to do most of the work (R. 38).

Orcutt testified that the petitioner couldn't stand on his feet any length of time, that he would work lying on the fender with his leg hanging off or he would take off his wooden leg and do work on generators where he could sit at a bench, or he worked on crutches. They did no garage work during the winter of 1925 and 1926, and in the spring of 1926, the partnership was taken over by one named Davidson (R. 60).

In 1928 the petitioner lost the farm, so the family moved to Lyndonville. He worked during the summer for Nadeau (R. 39). He was discharged early in the fall because he lost so much time (R. 39 and R. 107). In the late fall of 1928, the petitioner went into partnership with one John Bishop of Lyndonville. Bishop complained about having to do most of the work and in the summer of 1929, quit the partnership. The venture ended in December, 1929 (R. 39). In the year 1930 the petitioner tried selling aluminum kitchen utensils, but found he couldn't cover the territory assigned to him, although the wife did most of the work (R. 40). He gave this aluminum sales contract up after a short time. Thereafter he tried to sell a spot remover, and later in 1930-1931 he tried selling the Airway Vacuum Cleaners and was unable to cover his territory. His leg would become sore from carrying sample cases and then would have to stay home for several days (R. 41). In the spring of 1931 he tried selling wrenches and special tools, but had the same trouble with that work (R. 40).

The petitioner lived in Hardwick, Vermont, for seven years until 1937. During all this time he has had no job of any

steady nature and has been unable to hold any such job, but has tried odd jobs (R. 41). He tried a little trucking, and bought a truck, but lost the truck because he couldn't carry on (R. 42). With the help of high school boys he operated a small filling station and sold about 100 gallons of gasoline a day for about six months (R. 42).

In December, 1937, he moved to Brattleboro, Vermont. There he attempted working at two different filling stations; one job he quit because he couldn't stand the strain on his leg; it became blistered and sore (R. 42). The other job he worked only on Saturdays and Sundays, and even on those occasions after working two days would have to be on crutches the rest of the week (R. 43).

The foregoing is a short summary of the petitioner's testimony which is corroborated in every particular by his eighteen witnesses. Dr. Tierney of St. Johnsbury testified (R. 73), he treated the petitioner on July 16, 1920, and had treated him previous to that time. In 1921 he made up his mind that the petitioner's condition would never improve. He stated that the petitioner's condition would not improve because there had been poor surgery and there was not enough muscular flap or pad left at the time of the amputation to properly protect the stump. The nerves of the leg were not covered; they were too close to the surface (R. 72). This doctor stated that the petitioner had sustained a severe shock to his general nervous system, and in support stated that he did not see how the petitioner could be in any condition to pursue a gainful occupation since the wound was received (R. 74).

A capitulation of the petitioner's activities since the date of his injury and discharge from the service in 1919, shows the following summary:

Years of 1919, 1920, short period of time in vocational training, otherwise no employment.

From January, 1921, to April, 1923, in vocational training, losing considerable time on account of sickness, and unable to work.

April, 1923, to approximately October 1, 1923, Woodbury & Benoit Garage, St. Johnsbury, Vermont, employed, missing two days a week and discharged because he was unable to work.

October, 1923, Fairbanks Scale Shop, two weeks; discharged because he lost so much time.

November, 1923, until March, 1924, no employment during this time.

March, 1924, until spring of 1928, lived on a farm near Sheffield, Vermont, doing very little work on farm, the farm being operated by hired man, his wife and other relatives.

In 1924 and 1925, tried to carry on partnership with one Orcutt, but was unable to do the work.

In the year of 1928 he went into partnership with one John Bishop in Lyndonville, in a garage, and after a few months Bishop quit the partnership because he had to do all the work.

In 1930 he tried selling aluminum cooking utensils, but found he could not cover the territory assigned to him although his wife did most of the work; also tried to sell spot remover.

During the summer of 1930, and in the winter of 1930 and 1931, he tried to sell Airways Vacuum Cleaners, but was unable to cover the territory.

In the spring of 1931 he tried selling wrenches and tools, but had the same trouble with this work (R. 40).

Since 1931, he has had no work of any steady nature. He tried trucking, but was unable to do the work and lost his truck; operated some filling stations, sold about 100 gallons of gasoline a day for about six months. Had 3 or 4 high school boys working for him during that time.

This is substantially all of the work record of the petitioner since his discharge.

The record in this case shows overwhelming evidence that the petitioner has suffered from abscesses on his stump and

neuroma from the date of his injury to the present time. The evidence further shows that the petitioner's right leg was weakened on account of his wound, and tired easily, and petitioner has been unable to stand on it for any length of time. It is respectfully submitted that if the evidence adduced on behalf of the petitioner is to be believed by the jury, that there was sufficient evidence to show that this petitioner was permanently and totally disabled from the date of his injury on the battlefields of France.

The petitioner does not dispute the rule that a mere loss of a leg is not of itself a permanent and total disability, but in this case the evidence goes far beyond showing the mere loss of a leg. Not only does the evidence show that the petitioner has lost his left leg, it shows that the petitioner suffered grievous injuries to his right leg, so he could not use such leg for any sustained effort. The shrapnel which passed through the right leg and which had been taken out after the battle injury, unquestionably weakened the muscle of that leg, which is evidenced by the several scars on the right leg, one of which is $7\frac{3}{4}$ inches long. The loss of the left leg and the injuries to the right leg, plus the nervous shock which the petitioner still suffers takes this case out of the rule laid down by the courts that the mere loss of one leg is not a permanent and total disability. It is the combination of disabilities, to wit: the nervous condition, the weakness of the right leg and the loss of the left leg, which constitutes the permanent and total disability. Certainly no man has ever made a more heroic effort to earn a livelihood than this petitioner and for that reason the respondent wants to penalize him.

In determining whether there was any evidence to sustain a verdict for the petitioner all facts that the evidence supporting his claim reasonably tends to prove should be assumed as established and all inferences fairly deducible from them should be drawn in his favor. *Lumbra v. U. S., supra.*

Where two different conclusions may reasonably be drawn from uncontroverted evidence the question as to which should be drawn is for the trial court and not for the appellate tribunal.

Gunning v. Cooley, 281 U. S. 90, 94;
United States v. Gamble-Shagno, Inc., 91 Fed. (2d)
 372, 374, 8th CCA.;
Hearst Radio Inc. v. Good, 67 App. D. C. 250, 251,
 91 Fed. (2d) 555, 556;
United States v. Stewart, 61 App. D. C. 115, 58 Fed.
 (2d) 520;
United States v. Ingalls, decided by the United States
 Court of Appeals D. C. on August 5, 1940.

It is believed that the decision of the U. S. Circuit Court of Appeals for the Eighth Circuit in the case of the *United States v. Dupire*, 101 Fed. (2d) 945, conflicts with the decision of the Second Circuit in the instant case. In the *Dupire* case the Eighth Circuit laid down the rule that the mere loss of a leg in the absence of other complications would not constitute total and permanent disability, but whether the loss of a leg constitutes total disability within a War Risk policy depends upon the facts in each particular case. That evidence showing amputation of the insured's leg, though successful from a surgical standpoint, which left symptoms of deterioration of bone matter and so stump of leg was in constant state of irritation, and in addition the insured developed a highly nervous condition, sustained a finding that the insured was permanently and totally disabled under a War Risk insurance contract.

Compare also the opinion of the U. S. Circuit Court of Appeals for the Eighth Circuit in the case of *U. S. v. Rice*, 72 F. (2d) 676. The opinion of the Court in the *Rice* case can not be reconciled with the opinion of the Second Circuit in the instant case.

The decision of the Second Circuit in the instant case also conflicts with the views of the U. S. Circuit Court of Appeals for the Fifth Circuit in the case of *Thomas v. U. S.*, 92 F. (2d) 929, which was a War Risk Insurance case involving an injury to the petitioner's left leg in which the Fifth Circuit Court of Appeals held that the evidence was sufficient to take the case to the jury.

The decision of the Second Circuit Court of Appeals also conflicts with the views of the U. S. Circuit Court of Appeals for the Ninth Circuit as expressed in the case of *U. S. v. Scarborough*, 57 F. (2d) 137, where the Ninth Circuit held that gunshot or shrapnel wounds in the left leg of an insured were sufficient to constitute a permanent and total disability under the War Risk Insurance contract.

The U. S. Circuit Court of Appeals for the Ninth Circuit affirmed its views expressed in the *Scarborough* case in the later case of *U. S. v. Suomy*, 70 F. (2d) 542. The only difference between the *Suomy* case and the instant case is that in the *Suomy* case the plaintiff lost a portion of his left arm instead of his leg, as in the instant case. Also compare the views of the U. S. Circuit Court of Appeals for the Ninth Circuit in the case of *U. S. v. Rasar*, 45 F. (2d) 545.

It is true that the respondent may cite a number of cases involving only the loss of a leg, but these cases, the petitioner earnestly contends, are not in point. Here, the petitioner since the date of his discharge from military service has attempted time and again to make an honest and earnest effort to earn a livelihood. He has not succeeded because of his disabilities.

Your petitioner strongly urges these following few, simple thoughts to his Court of last resort:

The Circuit Court of three judges sitting over three hundred miles from the scene of trial overruled the verdict of a jury of twelve men and set itself up as a jury of the facts superior to the jury which actually heard the evidence and saw the witnesses.

There is a great tendency for all Appellate Courts to-day to set themselves up as a better judge of the facts than the twelve men who actually hear the evidence and see the witnesses. That tendency must be curbed.

The Circuit Court in its opinion says that the petitioner could not carry on his work as a photographer for which he had vocational training; it says he could not carry on his work of automobile mechanic for which he had vocational training. But because some twelve years after receiving his disability, for a period

of a few months he sold aluminum products on the road, the Circuit Court says that as a matter of law he could carry on some gainful occupation.

The petitioner wishes to forcefully point out that whether he could or not was a question of fact for the jury and the evidence was extremely one sided in the petitioner's favor in this regard. The evidence of his selling experience further clearly indicates that to do this selling he had to have his wife with him to do the hard work, the cooking of the meals, the washing of dishes and the carrying of the equipment around. All the petitioner did was to make a sales talk; that his expenses in providing food and in traveling around and taking his wife with him ate up more than he could earn and that is why after a few months he gave up his attempts at selling, and that is the only point that the Circuit Court cites as to how he might have been gainfully employed.

That question was surely before the jury on all the evidence in the case, and the petitioner asks this Supreme Court to review this case, and to protect him from having a decision of twelve men on facts overruled by three judges far removed from the scene of trial.

The rule laid down by the Second Circuit goes far beyond the rule laid down by this Honorable Court in the case of *Lumbra v. U. S.*, *supra*. It violates both the letter and the spirit of the Seventh Amendment to the Constitution of the United States, guaranteeing the right of trial by jury, and this Court should grant this petition for a writ of certiorari.

POINT 2.

The second point raised by the petitioner goes to the right of the Circuit Court to reverse the judgment and order that the petition of the petitioner be dismissed (R. 387).

The respondent made a motion for a directed verdict at the close of all of the testimony (R. 250). This motion was passed upon immediately by the District Court (R. 251). The Court did not take the motion under consideration and reserve its decision as might be done under subdivision (b) of Rule 50 of the Rules of Civil procedure which provides as follows:

"Rule 50 * * *

"(b) RESERVATION OF DECISION ON MOTION.

"Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, party who has moved for a directed verdict may move to have the verdict set aside and to have judgment entered in accordance with his motion for a directed verdict or if a verdict was not returned such party within 10 days after the jury has been discharged may move for judgment in accordance with his motion for a directed verdict. A motion for new trial may be joined with this motion or a new trial may be prayed for in the alternative. If the verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict has been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

The respondent in this cause did not move to set aside the verdict within ten days as required by the rule, and in fact the record shows that it failed to make any motion under Rule 50 except the motion for a directed verdict which was denied before the issue of fact was decided by the jury in the petitioner's favor.

The Circuit Court therefore had no authority to order that the petitioner's cause of action be dismissed as the case falls squarely within the rule laid by this Court in the case of *Slocum v. New York Life Insurance Company*, 228 U. S. 364, 57 L. Ed. 879, holding that a new trial must be awarded.

The respondent did not follow the rule which permitted the Circuit Court to dismiss the petition on a question of law, it did no more than was done by the respondent in the *Slocum* case.

Nor is the case of *Baltimore & C Line Inc. v. Redman*, 295 U. S. 654, 79 L. Ed. 1636, authority for the dismissal of

this action by the Circuit Court for the reason that in the *Redman* case the District Court reserved its decision on the motion for a directed verdict. Subdivision (b) of Rule 50 provides that the party making the motion for a directed verdict must take further affirmative action, and until that action is taken the matter stands as if no motion had been made.

The Circuit Court should have ordered a new trial under the ruling of this Court in the *Slocum* case.

In this manner substantial justice will be done. In its opinion the Circuit Court said (R. 385):

"To succeed upon that issue (permanent and total disability) he must show that he was unfitted for his former calling, or that for which he chose to be trained but for any other that was open to him." * * *

"There was no convincing evidence to justify that conclusion although a jury might have found that he was unable to do the work of a garage mechanic or that of a 'retoucher of photographs.'"

Upon a new trial the petitioner may well supply the defects, if any, in the testimony sufficient to prove a permanent and total disability.

He should be given that right, and he is entitled to a new trial unless this Court has overruled its previous decision in the *Slocum* case, *supra*. In the *Redman* case, this Court distinguished the *Slocum* case and did not contend that the previous decision in the *Slocum* case was overruled.

For this reason alone the petition for a writ of certiorari should be allowed.

CONCLUSION.

Wherefore, Petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this Cause directed to the United States Circuit Court of Appeals for the Second

Circuit and upon such a review the judgment of the Circuit Court of Appeals for the Second Circuit be vacated, reversed and set aside, and that this case be remanded to that Court with instructions to proceed further in accordance with the views of this Court.

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No. 336

In the Supreme Court of the United States

OCTOBER TERM, 1940

LEON A. HENRY, PETITIONER

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

BRING FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Rules and Regulations Involved.....	2
Statement.....	3
Argument.....	4
Conclusion.....	8
Appendix.....	9

CITATIONS

Cases:

<i>Baltimore & Carolina Line v. Redman</i> , 295 U. S. 654.....	7, 8
<i>Conway v. O'Brien</i> , 111 F. (2d) 611.....	8
<i>Lumbray v. United States</i> , 290 U. S. 551.....	5, 6
<i>Miller v. United States</i> , 294 U. S. 435, rehearing denied, 294 U. S. 734.....	6
<i>Thomas v. United States</i> , 92 F. (2d) 929.....	6
<i>United States v. Dupire</i> , 101 F. (2d) 945.....	6
<i>United States v. Green</i> , 69 F. (2d) 921.....	5
<i>United States v. Rice</i> , 72 F. (2d) 676.....	5, 6
<i>United States v. Scarborough</i> , 57 F. (2d) 137.....	6
<i>United States v. Spaulding</i> , 293 U. S. 498, rehearing denied, 294 U. S. 731.....	5, 6
<i>United States v. Suomy</i> , 70 F. (2d) 542.....	6

Miscellaneous:

Proceedings of the Institute on Federal Rules (Cleveland, Ohio, July 1938), p. 315.....	8
Proceedings of the Institute on Federal Rules (Washington, D. C., October 1938), p. 126.....	8
Proceedings of the Institute on Federal Rules (New York City, October 1938), p. 330.....	8
Treasury Decision No. 20.....	2, 4
Rule 50 (b), Rules of Civil Procedure.....	2, 4, 7, 8

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 336

LERÓY A. BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 383) is reported in 111 F. (2d) 615.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 15, 1940 (R. 387). The petition for a writ of certiorari was filed on August 14, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there was substantial evidence that petitioner incurred total permanent disability on or prior to August 31, 1919.

2. Whether, in the absence of a motion for judgment notwithstanding the verdict, the Circuit Court of Appeals had authority to dismiss the petition upon reversing the judgment for error in denying respondent's motion for a directed verdict.

RULES AND REGULATIONS INVOLVED

Treasury Decision No. 20, issued by the Bureau of War Risk Insurance, Treasury Department, on March 9, 1918 (see Regulations & Procedure of the United States Veterans' Bureau, Vol. I, p. 9), defines total permanent disability, for insurance purposes, as follows:

Any impairment of mind or body, which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.

Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

Rule 50 (b) of the Rules of Civil Procedure for the District Courts of the United States, provides, in part, as follows:

Whenever a motion for a directed verdict made at the close of all the evidence is denied

or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; * * *

STATEMENT

Petitioner, Leroy A. Berry, filed in the District Court for the District of Vermont on April 6, 1936, a petition seeking to recover total permanent disability benefits under two contracts of yearly renewable term insurance, which were issued on December 1, 1917, and April 12, 1918, respectively, and remained in force until August 31, 1919 (R. 1, 3-6). Petitioner alleged (R. 2-3), and the Government denied (R. 8), that he became totally and permanently disabled while the insurance was in force.

In the first trial, concluded on November 18, 1937, the jury reported a disagreement (R. 1). The second trial was held before Judge Howe and a jury of twelve at Montpelier, Vermont, during March of 1939 (R. 1). After the introduction of all the evidence, respondent moved for a directed verdict upon the ground that there was no substan-

tial evidence to show the alleged total and permanent disability (R. 250-251). The motion was denied (R. 251). A verdict was returned for petitioner and judgment was entered on the verdict on May 17, 1939 (R. 257).

A motion for judgment notwithstanding the verdict, permitted by Rule 50 (b), *supra*, was not made before the District Court. Upon appeal, the Circuit Court of Appeals for the Second Circuit held that, since there was no substantial evidence to support the verdict, the District Court had erred in not granting the respondent's motion for a directed verdict. It therefore reversed the judgment with instructions to dismiss the petition (R. 387).

ARGUMENT

1. Petitioner suffered the amputation of his left leg, about five inches below the knee, with attendant neuroma and nervousness. Scar tissue up to the right thigh resulted from flesh wounds. He claims a conflict of decisions (Pet. 15-16) because verdicts in other cases involving physical impairment of the same general character have not been disturbed.

(a) The policies sued on do not insure against any particular injury or ailment, but only against total permanent disability, that is, a disability which prevents the pursuit of any substantially gainful occupation and is reasonably certain to be permanent. (Treasury Decision No. 20, *supra*).

Whether such disability exists depends as much in each case upon the occupation, personality, education, and opportunity of the insured as upon the nature of his injury or disease. *Lumbra v. United States*, 290 U. S. 551, 559; *United States v. Green*, 69 F. (2d) 921, 922 (C. C. A. 8th).

(b) Moreover, regardless of the nature of his injury, actual performance of work by the insured may conclusively demonstrate that he is not totally and permanently disabled. It may be true, as petitioner contends, that the bare fact of gainful employment does not conclusively negative total and permanent disability, *United States v. Rice*, 72 F. (2d) 676 (C. C. A. 8th, 1934). Nevertheless, the insured may not recover for total and permanent disability, irrespective of the character of his injury, if the evidence indicates that he has substantially engaged in gainful employment, *Lumbra v. United States*, *supra*, at 561; *United States v. Spaulding*, 293 U. S. 498.

In this case there is undisputed evidence that between 1920 and the time his action was tried petitioner engaged in gainful employment over extended periods of time. This uncontroverted evidence also proves that petitioner's work was performed to the satisfaction of his employers, and that it resulted in substantial earnings. Such proof conclusively dissipates any inference that petitioner had become totally and permanently disabled. *Lumbra v. United States*, *supra*, at 561.

This evidence is set out in the Appendix, *infra*, pp. 9-13.

(c) The cases cited in petitioner's brief are not in conflict with the judgment of the court below. Neither in *United States v. Dupire*, 101 F. (2d) 945 (C. C. A. 8th), in *Thomas v. United States*, 92 F. (2d) 929 (C. C. A. 5th), nor in *United States v. Scarborough*, 57 F. (2d) 137 (C. C. A. 9th), was there evidence, or even a contention, that the insured had engaged in gainful employment at any time after injury. In both *United States v. Rice*, 72 F. (2d) 676 (C. C. A. 8th), and *United States v. Suomy*, 70 F. (2d) 542 (C. C. A. 9th), the question was simply whether the work in which the insured had engaged was of a sufficiently substantial character to make untenable an inference that he had been totally and permanently disabled. The permissibility of such an inference must necessarily be judged upon the facts proved in the individual case.

The opinion of the Court below reflects a recognition of the applicable principles of law, stated by this Court in *Lumbra v. United States*, 290 U. S. 551; *United States v. Spaulding*, 293 U. S. 498, rehearing denied, 294 U. S. 731; and *Miller v. United States*, 294 U. S. 435, rehearing denied, 294 U. S. 734, and by the various Circuit Courts of Appeals in numerous other cases. No question calling for further elucidation of those principles is here in-

volved and their application to the evidence in this case presents no occasion for review in this Court.

2. The Circuit Court of Appeals, upon reversing the judgment, was not required to grant a new trial. Respondent's motion for a directed verdict having been denied, the case was submitted to the jury, "subject to a later determination of the legal questions raised by the motion" (Rule 50 (b), *supra*). Since the legal question raised by the motion was decided by the Circuit Court of Appeals in respondent's favor, its direction to dismiss, and its failure to grant a new trial, fully accord with the decision in *Baltimore & Carolina Line v. Redman*, 295 U. S. 654. It was there held that a circuit court of appeals may reverse a judgment, entered on the verdict of a jury, and direct that the complaint be dismissed on the merits in the event the district court reserved its decision on a motion to direct a verdict in favor of the defendant. It follows, under that decision, that the only significant question is whether the district court has reserved power (by using the formula of reserving decision on the motion) to determine the legal question, raised by the motion, after receipt of the verdict; if it has, the circuit court of appeals on review may direct that the complaint be dismissed on the merits. Rule 50 (b), *supra*, provides in effect that the district court, before which the motion is made, will in every case be deemed to have reserved such power.

The reference in Rule 50 (b), to a motion to set aside the verdict and enter judgment in accordance with the motion for a directed verdict, merely indicates the procedure for invoking action by the district court. Neither the making of that motion nor the failure to make seems to have any bearing upon the right of the Circuit Court of Appeals to take the action approved in the *Redman* case. See Proceedings of the Institute on Federal Rules (Cleveland, Ohio, July 1938), pp. 313, 350, 383; *id.* (Washington, D. C., October 1938) pp. 85, 86, 126; *id.* (New York City, October 1938), pp. 281, 328, 330, 331, 336. Compare *Conway v. O'Brien*, 111 F. (2d) 644, 643 (C. C. A. 2d).

CONCLUSION

The decision of the Circuit Court of Appeals was correct. There is no conflict of decisions and no question which warrants further review by this Court. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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✓ JULIUS C. MARTIN,
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SEPTEMBER 1940.

APPENDIX

The health and employment record of petitioner, after the expiration of his insurance policies, may be summarized as follows:

From the 1st of February 1921, until April 15, 1923, petitioner followed a course of vocational training as an automobile mechanic. He worked in private garages and received his wages in part from the Government and in part from the shop owner. Records of his absences from work during this period show the following:

February 1921: Two days to go to Boston to have leg attended to (R. 346).

March 1921: Six days. The report assigns as the reason, "Had to quit" (R. 347). However, it was testified that petitioner quit because of a quarrel with the foreman which had nothing to do with his physical condition (R. 138).

May 1921: Two days to change shops (R. 348).

September 1921: One and one-half weeks. Sick with influenza (R. 349).

A report dated November 8, 1921, stated:

Attendance of trainee, Fair (has been sick quite a little).

* * * * *

REMARKS: During the summer months we paid trainee \$2.50¹ a day, during which time

¹ This has reference to payments by the shop owner in addition to vocational training pay allowed by the Government (R. 319).

he was here practically all the time. However, about a month and a half ago, the summer rush being over, and the need of the services of trainee were considerably lessened, the above-mentioned rate of \$1.00 a day was agreed upon. Since this time his attendance has dropped off, averaging the past few weeks not over two-thirds of time each week (R. 350).

November and December 1921: Twelve days because of injury to knee on the amputated leg (R. 35).

December 1921 and January 1922: Twelve days because of abscess on stump of leg. Operated on by Dr. Tierney and ordered to Boston to be measured for new artificial limb (R. 353).

February 1922: Three days. Reason not given (R. 353).

March 1922: Two days. Went to Boston to get new artificial limb fitted (R. 354).

April 1922: One day. Reason not given (R. 355).

May 1922: Three days. Reason not given (R. 356), and home on account of injury to arm while cranking car, five days (R. 358).

November 1922: One day. Sick (R. 359).

December 1922: One and one-half days on business by permission of counselor (R. 360).

February 1923: Ten days. Sick with influenza (R. 362).

There is undisputed testimony that, as a result of his vocational training, petitioner became a competent automobile mechanic (R. 63, 106, 108, 237), and that his employers regarded his work as satisfactory (R. 237, 240; see also R. 224, 232).

From April 15, 1923, to November 1923, petitioner continued his work in the same garage. But,

during this time, the entire compensation for his services was paid by the garage owner. Reports of training supervisors during this period indicate:

July 25, 1923. "Man rehabilitated as auto mechanic. Working for the St. Johnsbury Garage where he finished his training. Is doing good work and is well liked." (R. 366.)

October 19, 1923. "Working for the St. Johnsbury Garage, St. Johnsbury, Vt. Doing well. Receiving \$25.00 per week salary." (R. 366.)

From February 14 to December 31, 1930, petitioner was employed on commission as a salesman for the Aluminum Cooking Utensil Company. His sales, aggregating \$2,194.00, measured up to the average production of about 1,000 salesmen who were then employed by that company (R. 246-248). The assistance rendered by his wife with respect to this work was restricted to the cooking of food and the washing of dishes in connection with dinners served for the purpose of demonstrating the utensils. He made advance arrangements for the dinners, delivered the sales talks, and personally interviewed all the prospective purchasers. While, in making calls, his wife sometimes drove the car for him (R. 249), the petitioner has driven an automobile since 1920, except, as he testified, "Not always; there has been times I couldn't" (R. 136).

Work admittedly performed by petitioner between November 1923 and February 1930 (R. 36-40, 60), was not shown by contemporaneous records. However from 1924 to 1928, he performed some of the work on the farm where he lived and,

in addition—according to his written summary, dated February 14, 1930—was employed as follows:

Nov. 1922 to Jan. 1924, Mechanic, St. Johnsbury, L. C. Benoit, St. Johnsbury Garage, St. Johnsbury, Vt.; Jan. 1924 to May 1928, Prop., Sheffield, Vt., Berry Garage, Sheffield, Vt.; May 1928 to Jan. 1929, Mechanic, Lyndonville, Vt., J. E. Nadeau, Depot Garage, Lyndonville, Vt.; Jan. 1929 to Jan. 1930, Prop., Lyndonville, Vt., South End Garage, Lyndonville, Vt.; Jan. 1930 to Feb. 1930, Salesman, Lyndonville, Vt., L. D. Ratta, Air-Ways, Inc., Manchester, N. H. (R. 335; see also R. 343-344).

Subsequent to December 1930, petitioner sold spot remover, vacuum cleaners, and wrenches, each for a short period; worked about two weeks running an air compressor on a P. W. A. sewer project (R. 41); drove a truck hauling stone (R. 41, 109, 332), and logs (R. 207) for a few months; worked for wages in a service station (R. 48-49); did special repair jobs at his home for friends and acquaintances (R. 42, 225); and ran a filling station of his own for six months (R. 42, 155).

At the time of his discharge from the service, petitioner claimed disability only by reason of his amputated leg (R. 284); in his application for compensation executed on June 6, 1919, he asserted only that claim (R. 331); and in his several applications for a driver's permit, he certified that he had no other disability (R. 322, 325). He applied for and received two policies of insurance with private insurance companies (R. 139, 140-143), and at least in one of his applications, executed in 1928, he

certified that he was in good health, having no physical or mental infirmity other than the loss of the left leg (R. 338); that he had received no medical treatment during the preceding five years, other than an appendectomy in April 1928; and that during the preceding five years he had lost time from work by reason of illness only at the time of the appendectomy (R. 339).

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No. 326

In the Supreme Court of the United States

OCTOBER TERM, 1949

JAMES A. BEERY, PETITIONER

UNITED STATES OF AMERICA

VS. STATE OF CALIFORNIA, DOCTOR UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

WASH. FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Pertinent regulations and rules	2
Statement	4
Summary of argument	6
Argument:	
I. The district court should have granted the respondent's motion for a directed verdict	8
1. The evidence	8
2. The degree of disability	15
II. The circuit court of appeals in this case properly directed dismissal of the petition	18
A. The power to direct verdict or judgment survived the jury verdict	18
B. Irrespective of a post-verdict motion, disposition of the case should lie within the discretion of the circuit court of appeals	22
1. The district court	23
2. The circuit court of appeals	25
C. The circuit court of appeals in this case properly directed dismissal of the petition	31
D. Even if the circuit court of appeals would ordinarily be unable to direct dismissal of the petition, because of the absence of a post-verdict motion, it was proper to do so in this case	33
Conclusion	34

CITATIONS

Cases:	
<i>Aetna Ins. Co. v. Kennedy</i> , 301 U. S. 389	19
<i>Archer v. Eldredge</i> , 204 ⁹ Mass. 323	28
<i>A. Santaella & Co. v. Otto F. Lange Co.</i> , 155 Fed. 719	34
<i>Baltimore & C. Line v. Redman</i> , 295 U. S. 654	6, 19, 20, 27, 30
<i>Baltimore & Ohio R. Co. v. McCune</i> , 174 Fed. 991	34
<i>Buntin v. Chicago, Milwaukee & St. Paul Ry. Co.</i> , 54 Mont. 495	29
<i>Burnet v. S. S. Kresge Co.</i> , 98 Dept. Justice Bulletin	26

(I)

II

Cases—Continued.

	Page
<i>Burnet v. Deamornee</i> , 226 U. S. 145.....	31
<i>Conway v. O'Brien</i> , 111 F. (2d) 611, certiorari granted, No. 344, this term.....	26
<i>Dublin, Wicklow & Wexford Ry. Co. v. Slattery</i> , 3 A. C. 1155, 1199 (H. L., 1878).....	20, 28
<i>Ellis v. Hearn</i> , 132 App. Div. 207.....	29
<i>Fairmount Glass Works v. Cub Fork Coal Co.</i> , 287 U. S. 474.....	31
<i>Ferro Concreté Construction Co. v. United States</i> , 112 F. (2d) 488.....	26
<i>Gasoline Products Co. v. Champlin Refining Co.</i> , 283 U. S. 494.....	20
<i>Grebenstein v. Stone & Webster Co.</i> , 205 Mass. 431.....	31
<i>Hanagan v. United States</i> , 57 F. (2d) 860.....	17
<i>Kills v. Neahr</i> , 101 App. Div. 317.....	29
<i>Lawhon v. United States</i> , 82 F. (2d) 921.....	16
<i>Leader v. Apez Hosiery Co.</i> , 108 F. (2d) 71.....	30
<i>Limbershaft Sales Corp. v. A. G. Spalding & Bros.</i> , 111 F. (2d) 675.....	26
<i>Lowden v. Denton</i> , 110 F. (2d) 274.....	26
<i>Lumbra v. United States</i> , 290 U. S. 551.....	16, 17
<i>Massachusetts Protective Ass'n v. Moubert</i> , 110 F. (2d) 203.....	26
<i>Mead v. Robinson</i> , Barnes 451 (1774).....	20
<i>Miller v. United States</i> , 294 U. S. 435.....	17
<i>Montgomery Ward & Co. v. Duncan</i> , No. 30, October Term, 1940.....	6, 21, 24, 28, 30
<i>Moore v. Cross</i> , 86 Vt. 148, 150.....	29
<i>Norton v. City Bank & Trust Co.</i> , 294 Fed. 839.....	29
<i>Peterson, Ex parte</i> , 253 U. S. 300.....	20
<i>Pierce v. United States</i> , 255 U. S. 398.....	34
<i>Preston v. Mutual Life Ins. Co.</i> , 71 Fed. 467.....	29
<i>Reid v. Hoskins</i> , 6 El. & Bl. 952, 972 (1856).....	20
<i>Reliance Life Ins. Co. v. Burgess</i> , 112 F. (2d) 234, 240.....	26
<i>Santos v. Roman Catholic Church</i> , 212 U. S. 463.....	29, 31
<i>Slocum v. New York Life Ins. Co.</i> , 228 U. S. 364.....	19, 24
<i>Southern Railway Co. v. Bell</i> , 114 F. (2d) 341.....	26
<i>Theberge v. United States</i> , 87 F. (2d) 697.....	16
<i>Thomas v. United States</i> , 92 F. (2d) 929.....	18
<i>Toledo Co. v. Computing Co.</i> , 261 U. S. 399.....	29
<i>Treacher v. Hinton</i> , 4 Barn. & Ald. 413 (1821).....	20
<i>United States v. Adcock</i> , 69 F. (2d) 959.....	17
<i>United States v. Andersen</i> , 88 F. (2d) 291.....	16
<i>United States v. Dupire</i> , 101 F. (2d) 945.....	18
<i>United States v. Mayfield</i> , 64 F. (2d) 214.....	17
<i>United States v. Rice</i> , 72 F. (2d) 676.....	18
<i>United States v. Russian</i> , 73 F. (2d) 363.....	16

III

Cases—Continued.

Page

<i>United States v. Scarborough</i> ^h , 57 F. (2d) 137	18
<i>United States v. Spaulding</i> , 293 U. S. 498	16, 17
<i>United States v. Tennessee and Coosa Railroad Co.</i> , 176 U. S. 242	34
<i>United States v. Wood</i> , 299 U. S. 123	20
<i>Vallavanti v. Armour & Co.</i> , 264 Mass. 337	28
<i>Vaughn v. Charpiot</i> , 213 S. W. 950	29
<i>Walker v. New Mexico & Southern Pacific R. Co.</i> , 165 U. S. 593	20
<i>Washington Gas Co. v. Lansden</i> , 172 U. S. 534	29
<i>Whitney v. United States</i> , 8 F. (2d) 476	19
<i>Wilson v. Duckett</i> , 3 Burr. 1361	20

Statutes:

R. S. § 701	28
Act of October 6, 1917, c. 105, Sec. 402, 40 Stat. 398, 409	2

Miscellaneous:

Bulletin No. 1, Treasury Department, Regulations and Procedure, United States Veterans' Bureau, Vol. II, pp. 1233-1237	2
Thayer, <i>Evidence</i> , 241-244	28
Tidd, <i>Practice</i> , (London, 1850), II, 904-905	28
Treasury Decision No. 20, Regulations and Procedure, United States Veterans' Bureau, Vol. I, p. 9	3
Proceedings on Federal Rules of Civil Procedure:	
Cleveland proceedings, p. 315	27
New York proceedings, p. 283	27
Washington proceedings, p. 87	27
Report of the Advisory Committee on Rules for Civil Procedure, April 30, 1937	21
Rule 56 of Preliminary Draft of Rules of Civil Procedure, May 1936	21
Rules of Civil Procedure for the District Courts of the United States:	
Rule 41 (b)	18
Rule 50 (b)	2, 3, 6, 7, 19, 20, 22, 23, 24, 27, 29

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 336

LEROY A. BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 383) is reported in 111 F. (2d) 615.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 15, 1940 (R. 387). The petition for a writ of certiorari was filed on August 14, 1940, and was granted on October 21, 1940. The jurisdiction of this Court rests on Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondent at the close of the case moved for a directed verdict on the ground that there was no substantial evidence to support a verdict that that petitioner became totally and permanently disabled while his insurance policies were in force. It made no motion after verdict, under Rule 50 (b), for a judgment in accordance with its earlier motion. Judgment was entered on the verdict. The questions are:

1. Whether there is any substantial evidence to support the verdict.

2. If not, whether the circuit court of appeals in reversing has discretion to (a) direct entry of judgment for respondent, (b) direct a new trial, or (c) remand for action by the district court on opposing motions for judgment and for new trial; and whether in this case it properly directed dismissal of the petition.

PERTINENT REGULATIONS AND RULES

The contracts sued on were in the form of a regulation promulgated on October 15, 1917 (Bulletin No. 1, Treasury Department, Regulations & Procedure, United States Veterans' Bureau, Vol. II, pp. 1233-1237), which was issued pursuant to statutory authorization (c. 105, Sec. 402; 40 Stat. 409); it provided, so far as here pertinent, for payment to the insured of monthly benefits at

the rate of \$5.75 for each \$1,000 of insurance, in the event he became totally and permanently disabled while the insurance was in force.

By regulation issued on March 9, 1918 (Treasury Decision No. 20, Regulations & Procedure, United States Veterans' Bureau, Vol. 1, p. 9), total and permanent disability was defined as:

Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.

Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

Rule 50 (b) of the Rules of Civil Procedure for the District Courts of the United States provides:

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accord-

ance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

STATEMENT

On April 6, 1936, the petitioner, Leroy A. Berry, filed a petition in the United States District Court for the District of Vermont, to recover total permanent disability benefits under two contracts of yearly renewable term insurance. The policies, both providing protection against total permanent disability, were issued to petitioner by respondent on December 1, 1917, and April 12, 1918, respectively, and premiums were paid on them through the month of July 1919. Insurance protection under both policies expired on August 31, 1919, the date of expiration of the grace period for payment of the premiums due on August 1, 1919. (R. 1, 3-6, 193.) In the District Court, the petitioner alleged (R. 3-4), and the respondent denied (R. 8), that he became totally permanently disabled while the policies were in force. No other issue was raised.

The case was tried twice. In the first trial, concluded on November 18, 1937, the jury reported a disagreement (R. 1). After introduction of all the evidence at the second trial in March 1939, respondent moved for a directed verdict on the ground that there was no substantial evidence to show the alleged total permanent disability. The motion was denied (R. 25-1). Upon a verdict hereafter returned for petitioner (R. 258, 368), judgment was entered in his favor (R. 369). Neither a motion for judgment notwithstanding the verdict, nor a motion for a new trial, was made in the District Court.

Respondent appealed to the Circuit Court of Appeals for the Second Circuit, assigning error to the denial of its motion for a directed verdict, and praying reversal of the judgment (R. 370, 376-380). The Circuit Court of Appeals held that subsequent to the alleged date of total permanent disability the petitioner had followed a substantially gainful occupation under circumstances conclusively refuting any inference that he was totally and permanently disabled, and that, accordingly, respondent's motion for a directed verdict should have been granted (R. 383-386). The Circuit Court of Appeals reversed the judgment with instructions to dismiss the petition (R. 387).

SUMMARY OF ARGUMENT

I

The Circuit Court of Appeals properly held that respondent's motion for a directed verdict should have been granted because undisputed evidence showed that petitioner for considerable periods of time had engaged in substantially gainful employment without injury to his health for almost twenty years following the alleged date of total permanent disability. Throughout this period, petitioner repeatedly declared himself to be in sound health. This evidence conclusively negative his claim, essential to the recovery sought, that he became totally permanently disabled prior to the performance of such work.

II

A. The direction by the circuit court of appeals that the petition be dismissed raises no question under the Seventh Amendment. Rule 50 (b) of the Federal Rules of Civil Procedure adapts to routine practice the common law reservation of ruling on a motion for directed verdict (*Baltimore & C. Line v. Redman*, 295 U. S. 654) and therefore is not forbidden by the Constitution. *Montgomery Ward & Co. v. Duncan*, No. 30, this Term.

B. Irrespective of a post-verdict motion in the district court, we submit that the disposition of the case should lie within the discretion of the circuit court of appeals which reverses for failure to

grant the motion for a directed verdict. (1) Rule 50 (b) undoubtedly contemplates that the parties should move to set aside the verdict and to have judgment entered in accordance with the motion for a directed verdict. Such a motion is not an indispensable condition to the power of the district court, but seems a necessary part of orderly practice. (2) However, this conclusion does not mean that the appellate court is helpless to dispose of the case as justice and expedition should require. The authorities are equivocal as to whether a post-verdict motion is necessary to the power of the appellate court to direct entry of judgment. We think the best rule to be one which permits the circuit court of appeals in its discretion, according as the circumstances of the particular case may indicate, (a) to direct a new trial, (b) to direct entry of judgment for the appellant, or (c) to remand the case to the district court with directions to determine whether or not judgment should be entered or a new trial granted.

C. If the question is within the discretion of the circuit court of appeals, its order directing entry of judgment is probably not reviewable here. But if, because this Court has before it the whole record, it cares to reach its own conclusion, the circumstances of this case permit no alternative but a direction to enter judgment. The work record of the petitioner conclusively shows that he was not totally and permanently disabled while the in-

surance policies were in force, and there is nothing to suggest that considerations of fairness would require a new trial.

D. Even if the Circuit Court of Appeals, because of the failure of the respondent to make a post-verdict motion for judgment notwithstanding, was ordinarily powerless to direct entry of judgment, it had that power here because the failure of the district court on its own motion to enter judgment notwithstanding the verdict was plain error.

ARGUMENT

I

THE DISTRICT COURT SHOULD HAVE GRANTED THE
RESPONDENT'S MOTION FOR A DIRECTED VERDICT

It is, we think, abundantly plain that there is no substantial evidence to support the verdict (R. 258) that the petitioner has been permanently and totally disabled since June 16, 1918. The respondent's motion for a directed verdict, made at the close of all the evidence (R. 250), should therefore have been granted, and the circuit court of appeals properly reversed the decision of the district court which denied that motion.

1. *The Evidence.*—On June 16, 1918, fragments of high-explosive shells inflicted wounds to petitioner's left leg near the ankle, to his right thigh, and to several spots in the region of his right ear, arm, and shoulder (R. 14-16). His left leg was amputated about 6 inches below the knee (R. 268, 296).

On the right thigh muscle tissue only was affected, and after removal of a foreign body on June 27, 1918 the wound became completely healed, leaving considerable scar tissue, but no injury to nerves, vessels, or bones, and no impairment of function of the right leg (R. 268, 275-276). The wounds to the neck and shoulder left no permanent injury and appear to have healed promptly. The scars were not noted by a number of medical examiners, and were described by a medical examiner in 1930 as "superficial * * * None of these are giving any trouble" (R. 276).

Plaintiff was provided with an artificial limb while in the military service, and when discharged therefrom on January 2, 1919, his disability was regarded by examining physicians as 50%, by reason of the amputation of the left leg (R. 301). Except for the amputation, he was found to be physically and mentally sound (R. 287-288).

Dr. Tierney, whom petitioner had called as a witness, examined him a number of times during 1920 and 1921, and apparently treated an abscess on the stump of his amputated leg in December 1921 (R. 160). In a written report of his examination of petitioner made on July 16, 1920, Dr. Tierney stated that the stump of the left leg had healed and was not painful on pressure; that the prognosis was excellent; and that while petitioner's vocational handicap was major, vocational training was regarded as feasible (R. 259-260).

Prior to the date of this report, petitioner had engaged in vocational training in photography from May 14 to September 10, 1919, and again from September 22 to November 18, 1919 (R. 343, 357). He testified that he completed the course (R. 132, 330). He did not accept a position in a studio, obtained for him by vocational training officials, because, he testified, he could not do the retouching required (R. 133).

In response to the petitioner's insistent request (R. 344), he was granted another course in vocational training as an automobile mechanic, which he pursued from January 1921 to April 1923 (R. 344, 364). He was trained in private garages, receiving pay in part from the shop owners and in part from the Government (R. 319, 344-366). Statistical records of this training (R. 344-364) show that during this period of over two years¹ petitioner was absent from work an aggregate of 80½ days. Of that time, 41½ days absence were due to influenza, personal business, injury to his arm while cranking a car, and other reasons plainly not attributable to any permanent disability (R. 346-347, 347-348, 349, 356, 358, 360, 362). Absences for treatment of his amputated leg accounted for 4 days (R. 346, 354); 15 days absence was due to trouble with the leg (R. 352);

¹ The supervision reports in the record, however, do not cover an aggregate of two to four months during this period. See R. 346-348; 349, 351; 358-359.

an additional 13 days absence may have been due to this cause (R. 351, 359); and no reason was stated for the balance of 7 days (R. 353, 355, 356). He completed his vocational training at the St. Johnsbury Garage on April 15, 1923, but was retained there as an employee, receiving full pay from the shop owner until about January 1924 (R. 364, 335).

On July 25, 1923, a vocational training supervisor reported, "Man rehabilitated as auto mechanic. Working for the St. Johnsbury Garage where he finished his training. Is doing good work and is well liked" (R. 366), and on October 19, 1923, the training supervisor reported, "Working for the St. Johnsbury Garage, St. Johnsbury, Vt. Doing well. Receiving \$25.00 per week salary" (R. 366). All witnesses interrogated with respect to the result of petitioner's vocational training testified that he became a well-trained and competent mechanic (R. 63, 106, 108, 237). His employers testified that the work he performed was very satisfactory (R. 237, 240).

From 1924 to 1928, he was living on a farm. He testified that he did very little of the farm work (R. 37). However, he received an income during this period of approximately \$700 for a part (R. 151) of his milk and butterfat, which he sold to the Lyndonville Creamery (R. 213).

There is only fragmentary evidence of petitioner's employment between January 1924 and Feb-

ruary 1930. But petitioner's written summary, doubtless overstated, as contained in his application for an indemnity bond, executed on February 14, 1940, is as follows (R. 335):

Jan. 1924 to May 1928, Prop., Sheffield, Vt., Berry Garage, Sheffield, Vt. May 1928 to Jan. 1929, Mechanic, Lyndonville, Vt., J. E. Nadeau, Depot Garage, Lyndonville, Vt. Jan. 1929 to Jan. 1930, Prop., Lyndonville, Vt., South End Garage, Lyndonville, Vt. Jan. 1930 to Feb. 1930, Salesman, Lyndonville, Vt., L. D. Ratta, Air-Ways, Inc., Manchester, N. H.

From February 14 to December 31, 1930, petitioner was employed on a commission basis as a salesman for the Aluminum Cooking Utensil Company (R. 244). During this period he made gross sales in the amount of \$2,194.00, of which he retained as commission 30% or 40%; he averaged about 4½ working days a week (R. 246-248). Measured by the production of about 1,000 salesmen contemporaneously employed by the company, and considering his inexperience and the amount of time devoted to the work, petitioner's sales were "average" (R. 247). In this work, prospective purchasers were assembled at dinners served to groups of people at the home of one of them. Petitioner's wife described the manner in which this work was conducted as follows (R. 249):

Mr. Berry usually took his car and went out and made the arrangements for the

supper * * * we would go and get there about five o'clock and put on potatoes, meat, vegetables—or I fixed those and he talked to this lady about the supper—

* * * I watched them cooking to see they were coming along all right, and the people would come about seven o'clock. In the meantime I would set the table—if the hostess didn't have that already done—

* * * He used to carve the meat if she wished that it be done in the kitchen, and we served the supper. There was a moving picture machine went along with this. When he gave the sales talk I cleared up the dining room table and done up the dishes—done up our dishes so they were clean for inspection, and then done up her dishes. While they were in the living room he would hang up the curtain and give a very interesting sales talk. He could do that, and I did the work in the kitchen. He made arrangements with each couple to call on them within the next day or two * * * and if he wasn't able to drive the car I would drive the car and he made the call. He done the talking and I done the work.

Between December 1930 and the date of trial, petitioner sold spot remover, vacuum cleaners, wrenches, flavoring extracts, and cheese and butter, each for a short period (R. 40, 155); worked for a week or so repairing and running an air compressor on a P. W. A. project (R. 41); drove a truck hauling stone (R. 109, 232) and logs (R. 207) for a few

months (R. 151); worked for wages in a service station (R. 48-49); did a few special repair jobs at his home for acquaintances (R. 225); and ran a filling station of his own for about six months (R. 42, 155).

Petitioner was issued an automobile driver's permit each year from 1920 to 1939. Until 1926, when the issuance of professional permits was discontinued, petitioner's permit was of the professional class entitling him to operate vehicles for commercial purposes (R. 136-137, 242, 327).

At the time of his discharge from service, he claimed no disability other than the loss of his left leg (R. 286); he asserted no other claim in his application for compensation executed on June 6, 1919 (R. 331); and in his several applications for a driver's permit between 1934 and 1939 he certified that he had no other disability (R. 321-325).

He applied for and received two policies of insurance with private insurance companies (R. 139, 140-143), and in one of these applications, executed in 1928, he certified that he was in good health, having no physical or mental infirmity other than the loss of his left leg (R. 338, 340); that he had received no medical treatment during the preceding five years, except an appendectomy in April 1928; and that during the preceding five years he had lost time from work by reason of illness only at the time of the appendectomy (R. 339).

Each month since his discharge from service, petitioner has been paid compensation by the Gov-

ernment in amounts which have increased from \$30 to \$140 a month; at the time of trial they aggregated approximately \$16,800 (R. 319).

Petitioner's evidence shows that he has suffered severe pain because of nerve abscesses on the stump of his left leg, so that throughout his various employments his work was interrupted by nervous illness or soreness of the leg (R. 34, 38-43, 107); and that he abandoned most of these occupations either because he was unable to continue or because the employer considered his working time too irregular (R. 35-43, 102, 107, 216).

Petitioner and lay witnesses testified to observing blisters and abscesses on the stump of petitioner's amputated leg at various times since 1919 (R. 38, 42, 43, 61, 165, 174, 179, 183, 190), and it was testified that since his return from service thunderstorms, fireworks, and moving pictures portraying battle scenes have caused him to become emotionally upset and nervous (R. 27, 174, 180, 188), and sometimes nauseated (R. 189).

2. *The Degree of Disability.*—The undisputed evidence shows that petitioner engaged in substantially gainful employment over a period of nearly 20 years subsequent to the date upon which he claims to have become totally permanently disabled. The employment, it is true, was intermittent and was often accomplished with difficulty, but the fact remains that throughout this period petitioner was able to engage in gainful employment. Since there is nothing to show that his condition in 1939

was substantially worse than it was in 1919, it cannot be supposed that there was any injury to petitioner's health resulting from this work.

Referring to a number of typical cases in which the principle had been applied, this Court observed in *Lumbra v. United States*, 290 U. S. 551, 560, that "manifestly work performed may be such as conclusively to negative total permanent disability at the earlier time", and held that the insured's performance of work for periods aggregating more than five years out of the ten immediately following the lapse of his insurance, demonstrated that he did not become totally permanently disabled while the policy was in force. See also *United States v. Spaulding*, 293 U. S. 498; *United States v. Andersen*, 88 F. (2d) 291 (C. C. A. 1st); *Theberge v. United States*, 87 F. (2d) 697 (C. C. A. 2nd); *United States v. Russian*, 73 F. (2d) 363 (C. C. A. 3rd); *Lawhon v. United States*, 82 F. (2d) 921 (C. C. A. 10th). As stated in the *Lawhon* case, "Nothing can be more certain than that appellant was not totally disabled during the years he was following a gainful employment" (p. 922). That proposition is self-evident and is decisive of the present controversy.

Petitioner did not regard himself as totally permanently disabled while his policy was in force, or for many years thereafter. Upon each of the several occasions calling for his statement as to the condition of his health, he represented that he was in good health except for the loss of one leg.

and that he was able to work. He so represented at the time of his discharge from service on December 30, 1918 (R. 286); in his application for compensation executed on January 6, 1919 (R. 331); in each of his applications for an automobile driver's permit (R. 321-325); in his application for private insurance (R. 337-342); and in his application for an indemnity bond (R. 333-336).

Moreover, his insistence upon vocational training as an automobile mechanic in 1921 (R. 344) is inconsistent with a belief on his part that he was totally permanently disabled, and his belated assertion of claim for disability benefits under his policy is to be taken as strong evidence that he was not totally permanently disabled while the policy was in force. *Lumbra v. United States*, 290 U. S. 551; *United States v. Spaulding*, 293 U. S. 498; *Miller v. United States*, 294 U. S. 435.

Furthermore, petitioner's disability is of a character ordinarily not total in nature. As pointed out in *United States v. Mayfield*, 64 F. (2d) 214 (C. C. A. 10th), it is "a matter of common knowledge that there are many occupations which men with one leg can successfully follow". See also *Hanagan v. United States*, 57 F. (2d) 860 (C. C. A. 7th); *United States v. Adcock*, 69 F. (2d) 959 (C. C. A. 6th).²

² Since the individual stamina, initiative, education, and opportunity of the insured are pertinent factors affecting his ability to follow substantially gainful employment, it is of no consequence that in some cases, presenting no com-

In short, the jury could have concluded from the evidence that petitioner suffered severe pains from his leg, and that his repeated employments indicate him to be a man of determination and courage. But, in view of his undisputed work record and his many representations of sound health, it could not have found substantial evidence to support the conclusion that petitioner was totally and permanently disabled in 1919.

II.

THE CIRCUIT COURT OF APPEALS IN THIS CASE PROPERLY DIRECTED DISMISSAL OF THE PETITION

A. THE POWER TO DIRECT VERDICT OR JUDGMENT SURVIVED THE JURY VERDICT

The court below, having concluded that there was no substantial evidence to support the verdict of the jury, reversed the judgment entered by the District Court and remanded the cause with instructions to dismiss the petition (R. 386, 387). Such a dismissal would operate as an adjudication on the merits (Rule 41 (b)), and the mandate of the circuit court of appeals is the equivalent of a direction to enter judgment for the respondent.

parable work record, physical impairment of the same general character shown by the evidence here has been found on the facts of those cases to constitute total and permanent disability. See *United States v. Dupire*, 101 F. (2d) 945 (C. A. A. 8th); *United States v. Rice*, 72 F. (2d) 676 (C. C. A. 8th); *Thomas v. United States*, 92 F. (2d) 929 (C. C. A. 5th); *United States v. Scarborough*, 57 F. (2d) 137 (C. C. A. 9th).

Since the adoption of the Federal Rules of Civil Procedure, this procedure raises no problems under the Seventh Amendment.³ *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, it is true, ruled broadly that the federal courts could not enter judgment *non obstante veredicto* because of insufficiency of the evidence. See, also, *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389, 394. But, whatever might have been the enduring vitality of this decision, it was qualified by *Baltimore & C. Line v. Redman*, 295 U. S. 654, to permit either the district court or the appellate court to direct entry of judgment in accordance with a ruling on a motion for directed verdict when the trial judge had reserved decision on the motion until after submission of the case to the jury.

Rule 50 (b) adapts the *Redman* ruling to a routine trial practice. It provides:

Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.

This rule faithfully reflects the common law practice which formed the basis of the *Redman* ruling except in two immaterial particulars: (1) it was

³ Although the suit be against the United States, the statutory authorization of jury trial gives petitioner the rights which he would have in a suit against a private person. *Whitney v. United States*, 8 F. (2d) 476 (C. C. A. 9th). He raises the constitutional issue, but in a manner not precisely articulated (Pet. 4, 17-19).

apparently necessary at common law that the court's reservation be express (295 U. S. at 658-660); and (2) it appears that the common law reservation was accomplished with the consent of either the parties⁴ or the jury.⁵ Neither variation presents any question under the Seventh Amendment. The first simply substitutes a standing reservation of the legal question for the common law announcement by the court in each case, and the second simply takes for granted the consent of the parties if they do not object to the reservation announced by Rule 50 (b).⁶ It is obvious that neither departs in any degree from the substance of the common law procedure. It follows that neither is condemned by the Seventh Amendment.⁷

⁴ *Reid v. Hoskins*, 6 Bl. & Bl. 953, 971 (1856) *Dublin, Wick'ow & Wexford Ry. Co. v. Slattery*, L. R. 3 A. C. 1155, 1199 (H. L. 1878); *Wilson v. Duckett*, 3 Burr, 1361 (1762).

⁵ *Mead v. Robinson*, Barnes 451 (1744); *Treacher v. Hinton*, 4 Barn. & Ald. 413 (1821).

⁶ In *Baltimore & C. Line v. Redman*, 295 U. S. 654, the parties did not affirmatively consent to the reservation by the court but simply were silent when the reservation was announced. No. 178, October Term, 1934; R. 145, 242.

We suppose, in the unlikely event that a party should object to the reservation, that the trial judge could bring the reservation within the four corners of the common law etiquette by obtaining the consent of the jury. We do not, of course, suggest that so pedantic an adherence to the minutiae of common law procedure is essential under the Seventh Amendment.

⁷ *Walker v. New Mexico & Southern Pacific R. Co.*, 165 U. S. 593, 596; *Ex parte Peterson*, 253 U. S. 300, 309-310; *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494, 498; *Baltimore & C. Line v. Redman*, 295 U. S. 654, 657; *United States v. Wood*, 299 U. S. 123, 143-144.

The issue, in any event, has been settled by this Court.⁸ In *Montgomery Ward & Co. v. Duncan*, No. 30, this Term, the Court said:

The rule was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It does not alter the right of either party to have a question of law reserved upon the decision of which the court might enter judgment for one party in spite of a verdict in favor of the other. Prior to the adoption of the rule, in order to accomplish this it was necessary for the court to reserve the question of law raised by a motion to direct a verdict. The practice was an incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution.

Rule 50 (b) merely renders unnecessary a request for reservation of the question of law or a formal reservation and, in addition, regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. It adds nothing of substance to rights of litigants hereto-

⁸ The Report of the Advisory Committee on Rules for Civil Procedure to this Court, dated April 30, 1937, contained a note to the rule [then Rule 51 (b)] pointing out the apparent common law practice of obtaining the consent of the parties or of the jury to a reservation, and submitted an alternative version of the rule which would have made an express consent of the jury necessary in each case (pp. 126-127). See, also, Rule 56 of Preliminary Draft of Rules of Civil Procedure (May 1936), pp. 101-102. This more cumbersome alternative was rejected by the Court.

fore existing and available through a more cumbersome procedure.

It is plain enough, then, that the jury verdict for the petitioner did not cut off the power of either the district court or the circuit court of appeals to rule upon the motion for a directed verdict presented by the respondent at the close of the case. That motion, it is true, was denied by the district court (R. 250-251). But under the terms of Rule 50 (b) the court nonetheless reserved its ruling, and the denial could not have been final. Both the district court and the circuit court of appeals had power after the verdict to make the proper ruling on the motion for directed verdict and to enter judgment, or direct its entry, in accordance with that ruling. The only question is whether that power was lost or should not be exercised because the respondent failed to move in the district court for judgment notwithstanding the verdict.

B. IRRESPECTIVE OF A POST-VERDICT MOTION, DISPOSITION OF THE CASE SHOULD LIE WITHIN THE DISCRETION OF THE CIRCUIT COURT OF APPEALS

Rule 50 (b), after providing for the reservation of ruling on the motion for a directed verdict, continues:

Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict;

* * * the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. * * *

The respondent made no motion to have the verdict and judgment set aside and to have judgment entered in accordance with his motion for directed verdict, and did not assign error to the failure of the district court to enter judgment accordingly. While the question is not free from doubt, we submit that the circuit court of appeals, whether or not there has been a post-verdict motion, should have discretion to direct a new trial, to direct entry of judgment, or to remand to the district court to decide between opposing motions for judgment and for new trial.

1. *The District Court.*—Rule 50 (b) provides that a motion to set aside a verdict shall be made within 10 days after the verdict. That motion is not an indispensable condition to the power of the district court to enter judgment in accordance with the motion for a directed verdict. For the first sentence of Rule 50 (b) operates, as we have explained, as a reservation of the ruling of the district court upon the preverdict motion for a directed verdict: the jury verdict was taken "subject to a later determination of the legal questions raised by the motion." This undoubtedly implies that the district court had power of its own motion to enter

judgment notwithstanding the verdict;⁹ otherwise the reservation of its ruling would not be genuine and the operation of Rule 50 (b) would be plunged into the dubious territory of *Slocum v. New York Life Ins. Co.*, 228 U. S. 364. If the district court takes no action on the ruling reserved by Rule 50 (b), this may be supposed to mean only that it has decided to abide by its preverdict ruling, that the motion for a directed verdict should be denied. In this view, the question is not one of the court's power but of the party's rights.

But it is unrealistic to expect a busy district judge on his own motion to revive and reconsider a ruling made in the course of the trial. At common law and under the new Rules alike, legal procedure is based upon the fundamental assumption that the judge or the jury need consider only the points at issue between the parties. Any other view would make the carefully drawn provisions of Rule 50 (b) largely unnecessary. The motion for judgment notwithstanding the verdict, to be made within 10 days after verdict, was not included simply to provide sport for counsel. Its office seems

⁹ We follow the example of the opinion in *Montgomery Ward & Co. v. Duncan*, No. 30, this Term, and speak of the post-verdict motion as one for judgment notwithstanding the verdict, or as one *non obstante veredicto*. The economy of expression and thought found in adoption of the common law phraseology should not, however, obscure the significant differences between the common law motion and that of Rule 50 (b). Compare *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 381.

plainly to be to force the district court once again to consider the law and the evidence and to obtain the benefit of his considered judgment on the question.

We conclude, therefore, that the Rules, in the ordinary case, do not contemplate that the district court should be expected to enter judgment notwithstanding the verdict when there has been no motion requesting such an action.

2. *The Circuit Court of Appeals.*—This, however, does not carry as a consequence the further conclusion that the appellate court is helpless to dispose of the case as justice and expedition should require.

The major issue presented to the circuit court of appeals was whether the district court erred in failing to direct verdict for the appellant. The respondent by its motion for directed verdict raised the issue whether there was any substantial evidence to support a verdict for the petitioner (R. 250). Error was assigned to the ruling of the district court denying this motion (R. 379). As we have shown, the district court erroneously decided this issue against respondent and its decision was properly reversed.

The remaining question is simply as to the proper disposition of the case on reversal when the appellant has failed to request judgment notwithstanding the verdict in the district court. On the one hand there is the natural reluctance to give a

party more than he asks; on the other hand there is the obvious undesirability of burdening the courts and the parties by granting new trials when they would be a needless protraction of litigation which should have been terminated in the appellate court.

The Circuit Court of Appeals for the Second Circuit has resolved this issue in favor of economy of litigation. Judge Learned Hand, in *Conway v. O'Brien*, 111 F. (2d) 611, 613, certiorari granted, October 21, 1940, said:

It is not necessary that he should deny the motion once again; his failure to vacate his first order is enough. Hence it is proper here to dismiss the complaint.

That ruling was followed in the case at bar and in *Limbershaft Sales Corp. v. A. G. Spalding & Bros.*, 111 F. (2d) 675, 678 (C. C. A. 2d). No other court, so far as we have discovered, has considered the question in the absence of post-verdict motions. The phrasing of several of the opinions, however, suggests that those courts would hold such motions necessary if the question were presented to them.¹⁰

¹⁰ *Burnet v. S. S. Kresge Co.*, 98 Dept. Justice Bulletin; Rule 50 (C. C. A. 7th); *Southern Railway Co. v. Bell*, 114 F. (2d) 341 (C. C. A. 4th); *Reliance Life Ins. Co. v. Burgess*, 112 F. (2d) 234 (C. C. A. 8th); *Loorden v. Denton*, 110 F. (2d) 274, 278 (C. C. A. 8th); *Ferro Concrete Construction Co. v. United States*, 112 F. (2d) 488, 492 (C. C. A. 1st); *Reliance Life Ins. Co. v. Burgess*, 112 F. (2d) 234, 240 (C. C. A. 8th); cf. *Massachusetts Protective Ass'n v. Mober*, 110 F. (2d) 203, 207 (C. C. A. 8th).

The proceedings on the Federal Rules of Civil Procedure, held under the auspices of the American Bar Association and other associations, do not deal explicitly with this point. However, they contain discussions which assume that post-verdict motions would be made and some of which suggest that they might be necessary.¹¹

One can argue both ways from *Baltimore & C. Line v. Redman*, 295 U. S. 654. There the petitioner made a motion to set aside the verdict, which was denied together with the reserved motion for a directed verdict (No. 178, October Term, 1934; R. 260). But it also seems significant that the opinion of this Court does not stop to include this post-verdict motion in its summary of the procedural steps (295 U. S. at 656) and proceeds throughout upon the assumption that the power both of the district court and the appellate

¹¹ William D. Mitchell, Chairman of the Advisory Committee, said that under Rule 50 (b) the district judge is deemed to reserve the ruling "and consequently may on motion afterwards set aside the verdict, grant judgment notwithstanding, and the circuit court of appeals may take the same action." *Cleveland Proceedings*, p. 315. Again, he said: "* * * the trial court may later entertain a motion for judgment notwithstanding the verdict, and if that is denied the appellate court on review may reverse and order judgment without a new trial." *New York Proceedings*, p. 283. Judge W. Calvin Chesnut said that the party who moved for a directed verdict can, after verdict, "move for the entry of a judgment in his favor, *non obstante veredicto*, and if the trial judge goes wrong about that, the appellate court can set him right and give the proper judgment." *Washington Proceedings*, p. 87.

courts to direct entry of judgment rested alone on the reservation of the ruling on the motion for a directed verdict.¹²

One is left, then, with a question which seems to present competing considerations of policy and must be resolved on the basis of equivocal authority. We suggest a procedure which should measurably achieve both ends of policy: We believe the appellate court, when it has reversed for failure to direct verdict, whether or not there has been a motion for judgment notwithstanding, should have full discretion to direct a new trial, to direct entry of judgment, or to remand the cause to the district court for decision as to the disposition of the cause, presumably on the basis of opposing motions for judgment and for new trial. See R. S. § 701 (and Act of March 3, 1891, § 11, 26 Stat. 829); *Archer v. Eldridge*, 204 Mass. 323, 327; *Vallavanti v. Armour & Co.*, 264 Mass. 337, 341-342.

(a) The circuit court of appeals, when it reverses for errors of law in the course of the trial, such as the admission or exclusion of evidence, will of course direct that a new trial be had. *Montgomery*

¹² The common law practice differed markedly in its procedural details from that contemplated by the Rules, and contains no useful analogy as to the necessity of a post-verdict motion. It contemplated that the reserved ruling would be considered not at *nisi prius* but by the court *en banc*, as a part of the issues included in the customary rule *nisi*. See the discussion of Lord Blackburn in *Dublin, Wicklow & Wexford Ry. Co. v. Slattery*, L. R. 3 A. C. 1155, 1204-1205; Thayer, *Evidence*, 241-244; Tidd, *Practice* (London 1850), II, 904-905.

Ward & Co. v. Duncan, No. 30, this Term (pamph. p. 8). Even if the reversal be because of the absence of substantial evidence to support the verdict, justice may sometimes indicate that a new trial should be directed.¹³ If the appellee makes a sufficient showing to the circuit court of appeals that a new trial is appropriate, it plainly lies within the discretion of the court to direct a new trial on reversal, even though there is power to direct entry of judgment. Cf. *Toledo Co. v. Computing Co.*, 261 U. S. 399-419-421; *Washington Gas Co. v. Lansden*, 172 U. S. 534, 536.

(b) On the other hand, if there be no reason for a new trial, it seems an unnecessary burden on the judicial system to refuse to direct entry of judgment for an appellant who has failed to make the post-verdict motion contemplated by Rule 50 (b). Even if it be viewed as an appropriate penalty for negligent counsel, there is no justification for increasing the litigation burden in the federal courts

¹³ The situations in which a new trial may be appropriate even though, by definition, the party was not injured in the eyes of the jury are probably atypical but are nonetheless a real possibility. Examples, selected more or less at random, are: adoption of a new theory in the charge or in the appellate court (see *Norton v. City Bank & Trust Co.*, 294 Fed. 839 (C. C. A. 4th)); refusal of continuance (see *Vaughn v. Charpiot*, 213 S. W. 950 (Tex. Civ. App.)); surprise (see *Preston v. Mutual Life Ins. Co.*, 71 Fed. 467 (D. Mass.)); excusable absence of attorney (see *Kilts v. Neahr*, 101 App. Div. 317), or witness (see *Ellis v. Hearn*, 132 App. Div. 207); and misconduct of attorney (see *Buntin v. Chicago, Milwaukee & St. Paul Ry. Co.*, 54 Mont. 495) or witness (see *Moore v. Cross*, 86 Vt. 148, 150).

when a case should plainly be terminated in the appellate court.¹⁴ And there is no more likelihood of injustice to the occasional appellee who, although he has received the verdict, is entitled to a new trial because of unfairness in the original trial, than there is in the case of the appellee who has successfully withstood a post-verdict motion in the district court to have the judgment set aside. Yet, in those cases, there is unquestioned power to direct entry of judgment.¹⁵ It seems that any other construction, requiring the unnecessary burden of new trials simply because of the failure of counsel to make a post-verdict motion, would be forbidden by the general canon of interpretation found in Rule 1, requiring that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

(c) Finally, there may occasionally be cases in which the circuit court of appeals would be doubtful as to the correct disposition of the case. The appellee might suggest reasons of justice why there should be a new trial which were not conclusive but which might cause the appellate court to hesitate to direct entry of judgment. In such a case, the

¹⁴ In some cases, the failure to move in the district court after verdict might appropriately be considered by the appellate court in determining how to dispose of the case.

¹⁵ See *Baltimore & C. Line v. Redman*, 295 U. S. 654, 661; *Montgomery Ward & Co. v. Duncan*, No. 30 this Term (pamph. p. 8); *Leader v. Apex Hosiery Co.*, 108 F. (2d) 71, 81 (C. C. A. 3d), affirmed, 310 U. S. 469, and the ten decisions of five circuit courts of appeals cited, in text and note, *supra*, p. 26.

district court would be peculiarly fitted to determine the course indicated by considerations of justice.¹⁶ The circuit court of appeals, in this situation, might appropriately remand the cause to the district court to determine on opposing motions whether judgment should be entered for the appellant or whether there should be a new trial. See *Grobenstein v. Stone & Webster Co.*, 205 Mass, 431, 440-441.

If choice between these alternative dispositions of the cause be left to the discretion of the circuit court of appeals there would be combined, we believe, the expedition contemplated by the new rules and the protection of every substantial right of either party.

C. THE CIRCUIT COURT OF APPEALS IN THIS CASE PROPERLY
DIRECTED DISMISSAL OF THE PETITION

If we are correct in our view that the circuit court of appeals had discretion as to the disposition of the case, even though respondent made no post-verdict motion in the district court, its decision that dismissal of the petition should be directed will not be reviewed here except on claim of abuse of discretion. See *Burnet v. Desmornes*, 226 U. S. 145, 148; *Santos v. Roman Catholic Church*, 212 U. S. 463, 465; cf. *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 485.

¹⁶ Compare the familiar rule that the grant or denial of a new trial lies within the discretion of the district court and will not be reviewed except for abuse of discretion. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 485.

But it may be that this Court, by virtue of having before it the entire record, on a review substantially as broad as that in the circuit court of appeals, should itself determine whether entry of judgment or a new trial should be directed. In that event, it seems plain not only that the verdict should have been directed for the respondent but that the court below properly disposed of the cause.

Under the circumstances of this case there is no permissible alternative to a judgment in respondent's favor. The evidence, showing that petitioner had engaged in substantially gainful employment over extended periods of time, conclusively negatives petitioner's claim that he became totally and permanently disabled prior to the performance of this work.

Because it thus appears on the face of the record that the sole issue decisive of petitioner's claim could not be resolved in his favor even if a new trial were granted, the litigation should be terminated. Remand of the case to the district court for any further proceedings would be futile, since there are no grounds upon which the granting of a new trial, either for errors of law or as a matter of discretion, would be justified.

While we believe it to be plain that, if petitioner were granted a new trial, he could not make out a case warranting submission of the issue of total permanent disability to the jury, it may be pointed out that, even if weakness of evidence were grounds for a new trial, adequate opportunity to produce

additional evidence was presented petitioner during the sixteen months elapsing between the first and the second trials.

Petitioner has suggested, neither in the court below nor in this Court, any reason why it would be unfair to him to refuse a new trial. If, on oral argument, any persuasive reason for a new trial should be advanced, we would not argue that entry of judgment should be directed, but at the most would suggest that the cause should be remanded to the district court for decision as to judgment or new trial.

Accordingly, we submit that any order by the circuit court of appeals except the order of dismissal would necessarily result in nothing more favorable to petitioner than protracted litigation and useless expense, and that the order to enter judgment of dismissal should therefore be affirmed.

D. EVEN IF THE CIRCUIT COURT OF APPEALS WOULD ORDINARILY BE UNABLE TO DIRECT DISMISSAL OF THE PETITION, BECAUSE OF THE ABSENCE OF A POST-VERDICT MOTION, IT WAS PROPER TO DO SO IN THIS CASE

Finally, we suggest that even though the preceding analysis should be wrong, the circuit court of appeals in this case properly directed dismissal of the petition notwithstanding the respondent's failure to move after verdict for entry of judgment.

Rule 10 of the Rules of the United States Circuit Court of Appeals for the Second Circuit provides, in part, that "the court, at its option, may notice plain error not assigned." This reflects a general

rule of appellate litigation. See *United States v. Tennessee and Coosa Railroad Co.*, 176 U. S. 242, 256; *Pierce v. United States*, 255 U. S. 398, 406; *A. Santarella & Co. v. Otto F. Lange Co.*, 155 Fed. 719, 724 (C. C. A 8th); *Baltimore & Ohio R. Co. v. McCune*, 174 Fed. 991, 992 (C. C. A. 3d).

We have shown that, irrespective of any post-verdict motion by the respondent, the district court had full power to enter judgment notwithstanding the verdict (*supra*, pp. 23-24). In the present case, the failure of the district court to enter such a judgment was plain error. The verdict, as the court below ruled, should have been directed for respondent, and nothing appears in the record or has been suggested by the petitioner to indicate that a new trial should be granted for reasons of justice. Accordingly, even in the absence of a post-verdict motion by respondent, the circuit court of appeals had power to correct the plain error of the district court in failing to enter judgment for the respondent.

CONCLUSION

It is respectfully submitted that respondent's motion for a directed verdict should have been granted, and that the judgment of the circuit court of appeals should be affirmed, or, in any event, that the judgment of the circuit court of appeals should be modified only to the extent of ordering remand of the case for consideration

by the district court as to whether a new trial should be granted.

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KEITH L. SEEGMILLER,
Attorney.

JANUARY 1941.

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SUPREME COURT OF THE UNITED STATES.

No. 336.—OCTOBER TERM, 1940.

Leroy A. Berry, Petitioner, } On Petition for Writ of Certiorari
vs. } to the United States Circuit
United States of America. } Court of Appeals for the Second
Circuit.

[March 3, 1941.]

Mr. Justice BLACK delivered the opinion of the Court.

Petitioner sued the United States in a federal district court, alleging that he became totally and permanently disabled prior to ~~November~~ ^{December} 31, 1919, while his policies of War Risk Insurance were in force and effect.¹ Trial was had and evidence heard. The trial judge declined to grant the government's request for a directed verdict in its favor. The jury found for petitioner. The government, without having made any motion either for a new trial or for judgment notwithstanding the verdict, took the case to the Circuit Court of Appeals. Upon review that court held plaintiff had not produced sufficient evidence to justify submission of the cause to the jury. The court did not, however, remand the case to the District Court for further proceedings, but reversed the judgment and dismissed the cause of action.²

The petition for certiorari presented two questions: First, whether there was sufficient evidence to sustain the verdict; Second, whether the Circuit Court of Appeals erred in dismissing the cause instead of remanding it for a new trial. This second question invoked our jurisdiction in order to obtain an authoritative construction of subdivision (b) of Rule 50 of the Rules of Civil Procedure. In part that subdivision provides: "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to

¹ Though petitioner alleged that his policies were in effect until ~~November~~ ^{December} 31, 1919, in reality it was necessary for him to show that he became totally and permanently disabled prior to September 1, 1919. This variance in dates is not material, however.

² 111 F. (2d) 615.

have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . .” Since the government made no such motion within 10 days after the verdict, petitioner urged here that the Circuit Court of Appeals was without power to dismiss the cause but should have remanded it for a new trial. But while this important point, upon which the Circuit Courts of Appeals are not in complete agreement,³ is one of the two questions upon which the petition for certiorari rested, there is no occasion for us to reach it here. For we find that there was sufficient evidence to sustain the jury’s verdict, and we hold that the District Court properly denied the government’s motion for a directed verdict in its favor.

Rule 50(b) goes further than the old practice⁴ in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the jury’s without granting a new trial.⁵ But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact⁶—a jury being the constitutional tribunal provided for trying facts in courts of law. Here, although there was evidence from which a jury could have reached a contrary conclusion, there was testimony from which a jury could have found these to be the facts: Petitioner suffered injuries on June 16, 1918, while serving in the front lines in France. On that date, in the early morning hours, bits of shrapnel wounded

³ Compare *Conway v. O’Brien*, 111 F. (2d) 611, 613 (C. C. A. 2d), reversed this day, with *Pruitt v. Hardware Dealers Mutual Fire Ins. Co.*, 112 F. (2d) 140, 143 (C. C. A. 5th). And see *United States v. Halliday*, decided January 9, 1941 (C. C. A. 4th).

⁴ Compare *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, with *Baltimore & Carolina Line v. Redman*, 295 U. S. 654.

⁵ The relevant portion of the rule provides: “If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.”

⁶ See *Gunning v. Cooley*, 281 U. S. 90, 94; *Richmond & Danville R. R. v. Powers*, 149 U. S. 43, 45; *Texas & Pacific Ry. v. Cox*, 145 U. S. 593, 606; *Railroad Co. v. Stout*, 17 Wall. 657, 663.

him in the right arm, right shoulder, right hip and in front of the right ear. He was helped to a dugout by another soldier. There he found others who were wounded. About fifteen minutes after he arrived at the dugout, another shell struck, immediately in front of the dugout door. All the nine or ten men present were either killed outright or were so badly wounded that they were unable to leave. Petitioner's left leg was practically cut off below the knee. He twisted a part of his wrapped leggings around his wound to stop the bleeding. About six and one-half hours later he was taken on a stretcher and carried back to the First Aid Station. There his wounds were temporarily dressed. After another six or seven hours, he was carried to the hospital. Shortly thereafter an operation followed and his left leg was removed. He underwent several operations in the hospitals in France, leaving that country for the United States in August of 1918 and arriving in Boston on September 7. He was treated in hospitals in the United States until about Christmas, 1918. During the years between the time of the injury and the time of the trial, petitioner suffered repeatedly from abscesses and blisters on the stump of his left leg, and his right leg has caused him inconvenience, suffering and disability. In addition his nervous system has shown serious and continuous impairment, so much so that the Circuit Court of Appeals properly said, "Certain it is that he was neurasthenic, and had uncontrollable accesses of terror at any explosion, or even during thunder-storms." There has never been a time since his injuries when he could do work which required him to stand upon or use the stump without having it blistered, chafed or abscessed within two days. Several physicians who examined and treated him through the years were of opinion that he would never be able to work continuously at a gainful occupation because of his condition, and that he had never been able so to work since the wound was received. The government gave him vocational training both in photography and in automobile repair work. He tried both, but from his own evidence, corroborated by that of his employers in many instances, the jury could have found that in spite of his determination to succeed, he was physically unable to do so. He bought a farm. He was compelled to depend on the work of his own family and relatives in this undertaking, but the venture was

a failure and he lost the farm. He tried to operate a garage in partnership with another. In this, too, he was unsuccessful, and the jury could have found that his failure was attributable to his physical disabilities. For a time he was engaged as a salesman of aluminum cooking utensils. But here again the jury could have found that his contribution to the venture was small. For as elsewhere, there was testimony tending to show that it was a member of his family, in this instance his wife, whose labors made it possible for this activity to be carried on. Taking the evidence as a whole, the jurors, who heard the witnesses and personally examined the petitioner's wounds, could fairly have reached the conclusion that since his injuries petitioner never had been able, and would not be able thereafter, to work with any reasonable degree of regularity at any substantially gainful employment. The trial judge, who had the same opportunity as the jury to hear the witnesses, denied the government's motion for a directed verdict and correctly instructed the jury what they must find from the evidence in order to return a verdict for petitioner.⁷

It was not necessary that petitioner be bed-ridden, wholly helpless, or that he should abandon every possible effort to work in order for the jury to find that he was totally and permanently disabled.⁸ It cannot be doubted that if petitioner had refrained from trying to do any work at all, and the same evidence of physical impairment which appears in this record had been offered, a jury could have properly found him totally and permanently disabled. And the jury could have found that his efforts to work

⁷ The government expressed satisfaction with the trial judge's charge, which, as to total and permanent disability, contained this statement: "A total disability is any physical or nervous injury which makes it impossible for a person to follow continuously a substantially gainful occupation at any kind of work for which he was competent or qualified, physically and mentally, or for which he could qualify himself by a reasonable amount of study and training. The word 'total' as applied to 'disability' does not necessarily mean incapacitated to do any work at all. The word 'continuously' means with reasonable regularity. It does not preclude periods of disability which are ordinarily incident to activities of persons in generally sound health, for nearly all persons are at times temporarily incapacitated by injuries, or poor health, from carrying on their occupations. If Berry was able to follow a gainful occupation only spasmodically, with frequent interruptions, due to his injuries, and his shock, he was totally disabled. A disability is permanent when it is of such a nature that it is reasonably certain it will continue throughout a person's lifetime."

⁸ *Lumbra v. United States*, 290 U. S. 551, 559-560.

all of which sooner or later resulted in failure—were made not cause of his ability to work but because of his unwillingness to lead a life of idleness, even though totally and permanently disabled within the meaning of his policies.⁹ Nor does the fact that he waited thirteen years before bringing suit stand as an insuperable barrier to his recovery. His case was not barred by any statute limitations. Whatever weight the jury should have given to the circumstance of petitioner's delay in filing his claim, that weight was still for their consideration in connection with all the other evidence in the case.

There was evidence from which a jury could reach the conclusion that petitioner was totally and permanently disabled. That is enough. The judgment of the Circuit Court of Appeals is reversed, and that of the District Court is affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END

See *United States v. Rice*, 72 F. (2d) 676, 677; *Nicolay v. United States*, F. (2d) 170, 173; *United States v. Lawson*, 50 F. (2d) 646, 651; *United States v. Godfrey*, 47 F. (2d) 126, 127; *United States v. Phillips*, 44 F. (2d) 691.